United States Court of Appeals

for the Second Circuit

APPENDIX

75-6081

B P/S

United States Court of Appeals
FOR THE SECOND CIRCUIT

BROWN & WILLIAMSON TOBACCO CORPORATION,
Plaintiff-Appellant,

against

LEWIS A. ENGMAN, Chairman, Federal Trade Commission, et al.,
Defendants-Appellees.

75-6081

PHILIP MORRIS INCORPORATED,
Plaintiff-Appellant,

against

LEWIS A. ENGMAN, Chairman, Federal Trade Commission, et al.,
Defendants-Appellees.

75-6085

R. J. REYNOLDS TOBACCO COMPANY,
Plaintiff-Appellant,

against

LEWIS A. ENGMAN, Chairman, Federal Trade Commission, et al.,
Defendants-Appellees.

75-6088

LOEW'S THEATRES, INC.,
Plaintiff-Appellant,

against

LEWIS A. ENGMAN, Chairman, Federal Trade Commission, et al.,
Defendants-Appellees.

75-6087

AMERICAN BRANDS, INC.,
Plaintiff-Appellant,

against

FEDERAL TRADE COMMISSION, et al.,
Defendants-Appellees.

75-6090

LIGGETT & MYERS INCORPORATED,
Plaintiff-Appellant,

against

LEWIS A. ENGMAN, Chairman, Federal Trade Commission, et al.,
Defendants-Appellees.

75-6089

(Continued on Inside Cover)

UNITED STATES COURT OF APPEALS
FILED
SEP 22 1975
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

b

PAGINATION AS IN ORIGINAL COPY

On Appeal from the United States District Court,
For the Southern District of New York

APPELLANTS' APPENDIX

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Attorneys for Plaintiff-Appellant
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Washington, D. C. 20036
Attorneys for Plaintiff-Appellant
Liggett & Myers Incorporated

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CONSOLIDATED FOR ALL PURPOSES WITH 75 CIV.4046(KTD)/4049(KTD)/4050(CHT)

CIVIL DOCKET (CARRY UNDER 75 Civ.4047(CHT)

UNITED STATES DISTRICT COURT

75 CIV. 4047

Jury demand date:

D. C. Form No. 106 Rev.

JUDGE TENNEY

208-1	75-4047	08-15-75	2	890	1

TITLE OF CASE

BROWN & WILLIAMSON TOBACCO CORP.

-vs-

ENGMAN, LEWIS A. Chairman Federal Trade Commission
DIXON, PAUL RAND
THOMPSON, MAYO J.
HANFORD, M. ELIZABETH
NYE, STEPHEN Members Federal Trade Commission
FEDERAL TRADE COMMISSION
LEVI, EDWARD H. Atty. Gen'l. U.S.
UNITED STATES OF AMERICA

ATTORNEYS

0844 RG

For plaintiff:

Paul, Weiss, Rifkind, Wharton & Garrison
345 Park Avenue
New York, N.Y. 10022
tele: 644-8000

For defendant:

STATISTICAL RECORD	COSTS	DATE	NAME OR RECEIPT NO.	REC.	
J.S. 5 mailed x	Clerk	AUG 15 1975	56365		
J.S. 6 mailed	Marshal				
Basis of Action: Action for a declaration that pltff. is in compliance with FTC order and to stay accumulation of civil penalties, etc.	Docket fee			6	
	Witness fees				
	Depositions				

Docket Entries in 75 Civ. 4047

75 Civ.4047 BROWN & WILLIAMSON TOBACCO CORPORATION VS.LEWIS A.ENGMAN,ETC.ET AL 75 Civ 4047

DATE	PROCEEDINGS
08-15-75	(1) Filed complaint and issued summons.
08-15-75	(2) Filed ORDER apppinting Process server by Edward H.Sutton of Summons&Complaint of above,Summons&Complaint upon defts.Clk.with atchd affdvt by Martin Lo
08-19-75	(3) Filed Pltffs Affdvt&Order to Show for Preliminary Injunction re:Staying pend final judgment ,etc.Ret.8/25/75,Rm. 1305,2:00 p.m.
08-19-75	(4) Filed Brief of pltff in support of application for stay.
08-19-75	(5) Filed Summons with Affdvt of Service by Edward H.Sutton of Summons&Complaint upon defts.Engman,Dixon,Thompson,Hunford&Nye
08-27-75	(5) Filed Defts ORDER OF CONSOLIDATION .Captioned cases-75 Civ.4047(CHT),75 4048(I 75 Civ.4049 (KTD),75 Civ.4050(CBM),75 Civ.4051(CLB) and 75 Civ.4052 (CLB) are hereby consolidated pursuant to Rule 42(a)FRCP&Rule 13 for Adm of Civil&Criminal Calendars of SDNY.Tenney,J(mn)
08-28-75	(6) Filed OPINION#43008. Pltff's motion for preliminary injunction denied.Tenney J. (mn)
09-04-75	(7) Filed Pltff's Notice of Appeal from ordered entered 8/28/75 which denied " motion for an order staying , pending final judgment,the accumulation of penalties under Sec.5 of Federal Trade Commission Act,15 USC,Sec.45 for alleged violations of a Federal Trade Commission consent order.and (mailed notice to Hon.Edward H.Levi; Conboy,Hewitt,O'Brien&Boardman; Davis,Polk&Wardwell;Weil,Gotschal and Manges;Chadbourne,Parke,Whiteside & Wolff & Lewinger R.Barrett on 9/5/75.)
09-05-75	(8) Filed Pltff American Brands,Inc. Notice of Appeal re:Order denying pltff's motion for preliminary injunctive relief staying ,pending final judgment,accumulation of penalties under Sec.5,Federal Trade Commission Act,entered on 8/28/75(mailed copy to AUSA Weisberg;Paul, Weiss,Rifkind,Wharton&Garrison; Arnold&Porter; Conboy,Hewitt,O'Brien &Boardman; Clifford,Warnke,Glass,McIlwain&Finney; Davis,Polk&Wardwell; Weil,Gotshal&Manges; Patton Boggs&Blow; Grainger R.Barrott on 9/8/75) (Re
09-05-75	(9) Filed Pltff Liggett&Myers Incorporated Notice of appeal from order filed 8/28/75 denying pltff's motion for a stay pending final judgment (mailed copy to AUSA Weisberg;Conboy,Hewitt,O'Brien&Boardman; Irving Scher;Davis ,Polk&Wardwell;Daniel J.O'Neill;Paul,Weiss,Rifkind,Wharton &Garrison on 9/8/75) (Re;75-4052(CI)
09-05-75	(10) Filed Pltff,Philip Morris Incorporated Notice of Appeal from order filed 8/28/75 denying pltff's motion for an order staying,pending final judgment(mailed copy to Paul,Weiss,Rifkind,Wharton&Garrison,Esqs.; Davis,Polk&Wardwell;Weil,Gotshal&Manges;Chadbourne,Parke,Whiteside& Wolff;Grainger R.Barrett,Patton Boggs&Blow&Paul J.Curran, on 9/8/75) (re:75 Civ.4048(KTD)
09-05-75	(11) Filed Pltff.R.J.Reynolds Tobacco Company Notice of Appeal from Order of 8/28/75 denying pltff's motion for an order staying,pending final judgment (mailed copy to AUSA Weisberg; Paul,Weiss,Rifkind,Wharton &Garrison; Arnold&Porter;Conboy,Hewitt,O'Brien&Boardman; Weil,Gotshal &Manges;Chadbourne,Parke,Whiteside&Wolff;Anderson,Russell,Kill&Olick; Patton Boggs&Blow&Grainger R.Barrett on 9/8/75)(re:75 -4049(KTD))
09-05-75	(12) Filed Pltff.Loew's Theatres,Inc.Notice of Appeal from order of 8/28/75 which denied pltff's motion for an order staying,pending final judgment(mailed copy to AUSA Weisberg; Paul,Weiss,Rifkind,Wharton& Garrison;Arnold&Porter;Conboy,Hewitt,O'Brien&Boardman;Clifford, Warnke,Glass,McIlwain&Finney;David,Polk&Wardwell;Chadbourne,Parke, Whiteside&Wolff;Anderson,Russell,Kill&Olick;Patton Boggs&Blow& Grainger R.Barrett on 9/8/75)(re:75 -4050(CBM)
09-05-75	(13) Filed Bond undertaking for costs on appeal in sum of $250.(Federal Insurance Comp

75 civ 4047 Brown & Williamson Tobacco Corp. vs Lewis A. Engman et al. 75 ci

D. C. 110 Rev. Civil Docket Continuation

DATE	PROCEEDINGS
9-8-75	(17) Filed counteraffidavit on motion to dismiss & to supplement record on application for stay of procedings by H.T. Austern.
9-8-75	(18) Filed counteraffidait on motion to dismiss & to supplemant record on appication for stay of penalties, by Horace Kornegay.
9-8-75	(19) Filed pltffs brief in opposition to defendants motion to dismiss.
9-8-1975	(20) Filed attachment A to pltff counteraffidavit on motion to dismiss & to supplement record on applicaion for stay.
9-8-1975	(21) Filed affidavit of Wm J. Moore in opposition to defts motion todismiss and to supplement record.
9-9-1975	(22) Filed govts memo of law .
09-09-75	(23) Filed Pltff-Appellant Counteraffdvt on motion to dismiss and to supplement record on record on application for stay of penalties.
09-09-75	(24) Filed Notice that record on appeal is tertified and transmitted to USCA.

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DOCKET ENTRIES IN 75 CIV. 4048

CIVIL DOCKET
AUG 75 CIV.1052 (CLB)-- FOR ALL PURPOSES.
UNITED STATES DISTRICT COURT
TENNEY, J. Jury demand date:
(FILE IN 75 CIV.4047)

75 CIV. 4048

D. C. Form No. 106 Rev.

JUDGE

| TITLE OF CASE | | |

Docket Entries in 75 Civ. 4048

ENGMAN, LEWIS, Chairman, Federal Trade Commission, etal

75 CIV. 4048

JUDGE TENNEY

JUDGE DUF...

DATE	PROCEEDINGS	Judgment
08-15-75	(1) Filed complaint and issued summons.	
08-15-75	(2) Filed Order appointing Howard F.Bascom, Jr., as process server. CLERK	
08-21-75	(3) Filed pltff s affdvt. and Order to Show Cause for preliminary injunction. Service on or before 08-19-75 as indicated. Ret. 08-25-75., STEWART, J.	
08-21-75	(4) Filed pltff's brief in support of application for stay of accrual of penalties.	
08-21-75	(5) Filed summons and affdvt. of service by an individual of summons, verified complaint, order pursuant to Rule 4 (c), order to show cause and pltff's brief in support of applicatiofor stay, served the followings: Lewis A. Engman, Paul Rand Dixon, Mayo J. Thompson, M. Elizabeth Hanford and Stephen Nye, by U.S. ATTY, S.D.N.Y. and by mail, copies to each of them at Federal Trade Commission Building, Wash., D.C. and copy to Atty. General, Wash., D.C. on 08-15-75 Federal Trade Commission by U.S. Atty. S.DN.Y. on 08-15-75 copies by mail to Federal Trade Commission Bldg., Wash., D.C. on -8-15-75 copy to; Atty. General, Wash., D,C. on 08-15-75 Edward H. Levi by U.S. Atty. S.D.NY on 08-15-75 by mail to Atty General, Wash., D.C. on 0 8-15-75 United States of America by U.S. Atty. SDNY on 08-15-75 copy by mail to Atty. General, Wash. DC on 08-15-75	
08-27-75	--- Filed order of consolidation into 75 CIv. 4047 (CHT)- TENNEY, J.	
09-5-75	Docketed Pltff. Philip Morris Incorporated Notice of Appeal from order filed 8/28/75 denying pltff's motion for an order staying, pending final judgment (mailed copy to Paul, Weiss, Rifkind, Wharton&Garrison; Davis, Polk&Wardwell; Weil, Gotshal&Manges; Chadbourne, Parke, Whiteside&Wolff; Grainger R. Barrett; Patton, Boggs&Blow & Paul J. Curran on 9/8/75)(Filed in lead case #1)	

A 6

DOCKET ENTRIES IN 75 CIV. 4049

CIVIL DOCKET

UNITED STATES DISTRICT COURT

JUDGE DUFFY

75 CIV 4049

Jury demand date:

D. C. Form No. 106 Rev.

TITLE OF CASE	ATTORNEYS
208-1 75 4049 08 15 75 2 890 1	0860 e.v.
R. J. REYNOLDS TOBACCO COMPANY	For plaintiff: Davis Polk & Wardwell, 1 Chase Manhattan Plaza New York, New York 10005 HA 2-3400
VS.	
ENGMAN, LEWIS A., Chairman, Federal Trade Commission,	
DIXON, PAUL RAND	
THOMPSON, MAYO J.	
HANFORD, M. ELIZABETH and	
[illegible], STEPHEN, Members, Federal Trade Commission,	
FEDERAL TRADE COMMISSION	
LEVI, EDWARD H., Attorney General of the United States; and	For defendant:
UNITED STATES OF AMERICA	

JUDGE DUFFY

STATISTICAL RECORD	COSTS	DATE	NAME OR RECEIPT NO.	REC.
J.S. 5 mailed	Clerk	AUG 15 1975	56367	
J.S. 6 mailed	Marshal			
Basis of Action: U.S. Const. Amend V; 15 U.S.C. 88[illegible] et seq. etc. sale & distribution of Cigarettes, etc) Declaratory judgment & injunctive Relief.	Docket fee			
Action arose at:	Witness fees			
	Depositions			

Docket Entries in 75 Civ. 4049

75 CIV 4049 R.J. REYNOLDS TOBACCO COMPANY V. ENGMAN, LEWIS A. Chairman, Federal Trade Commission, ET AL

JUDGE TENNEY 75 CIV. 4049

DATE	PROCEEDINGS	Date Order or Judgment
08-15-75	(1) Filed complaint and issued summons.	
08-15-75	(2) Filed Order appointing William J. Lind, as process server. CLERK	
08-18-75	(3) Filed ORDER TO SHOW CAUSE for preliminary injunction, STEWART, J Ret. 08-25-75 at 2:00 PM in Room 1305.	
08-18-75	(4) Filed Pltff's Brief in support of application for stay.	
08-18-75	(5) Filed summons and Affidavit of service by an individual- served the following: U.S.Atty. Southern District by Walter G.Brannon on 08-15-75. Lewis A. Engman, Fed.Trade Commission by Myer S.Turkoff on 08-1	
08-27-75	Filed Order of consolidation into 75 Civ.1047 (CHT). TENNEY, J.	
09-05-75	Docketed Pltff.R.J.Reynolds Tobacco Company Notice of Appeal from Order of 8/28/75 denying pltff's motion for an order staying, pending final judgment (mailed copy to AUSA Weisberg; Paul, Weiss, Rifkind, Wharton&Garrison; Arnold&Porter; Conboy, Hewitt, O'Brien&Boardman; Weil, Gotshal&Manges; Chadbourne, Parke, Whiteside&Wolff; Anderson, Russell, Kill&Olick; Patton Boggs&Blow & Grainger R.Barrett on 9/8/75) (Filed in lead Case #1)	

A 8

DOCKET ENTRIES IN 75 CIV. 4050

CIVIL DOCKET 75 CIV.4049(KTD)-75 CIV. 4051(CLB) C.D. CIV. 4455

UNITED STATES DISTRICT COURT 75 CIV.4052 (CLB)- FOR ALL PURPOSES-TENNEY, J.(FILE

Jury demand date: JUDGE L

D. C. Form No. 106 Rev.

JUDGE MOTLEY

TITLE OF CASE	ATTORNEYS
208-1 75 4050 08 15 75 2 890 1	0847 e.v.
LOEW'S THEATRES, INC.,	For plaintiff: Weil, Gotshal and Manges, 767 Fifth Avenue, New York, N PLaza 8-7800
VS.	
ENGMAN, LEWIS A., Chairman, Federal Trade Commission,	
DIXON, PAUL RAND	
THOMPSON, MAYO J.	
HANFORD, M. ELIZABETH, and	
NYE, STEPHEN, Members, Federal Trade Commission,	
FEDERAL TRADE COMMISSION	
LEVI, EDWARD H., Attorney General of the United States; and	For defendant:
UNITED STATES OF AMERICA	

STATISTICAL RECORD	COSTS		DATE	NAME OR RECEIPT NO.	REC.	
J.S. 5 mailed X	Clerk	AUG 15 1975		56368		
J.S. 6 mailed	Marshal					
Basis of Action: U. S. Const. Amend. V; 15 U.S.C. §§1 et seq. etc. Declaratory Judgment and Injunctive relief. (Advertisements & promotional materials for cigarettes)	Docket fee					
	Witness fees					
	Depositions					
Action arose at:						

Docket Entries in 75 Civ. 4050

JUDGE TENNEY 75 CIV. 405

DATE	PROCEEDINGS	Date Or Judgmen
8-15-75	(1) Filed complaint and issued summons.	
8-15-75	(2) Filed Order appointing Edward H.Sutton as process server. CLERK	
8-22-75	(3) Filed affdvt. of service by mail by an individual of summons, verified complaint, order pursuant to Rule 4(c), order to show cause and pltff's memorandum of law- served the following defts at Wash., DC. by cert. mail, Lewis A. Engman, Paul Rand Dixon, Mayo J. Thompson, M. Elizabeth Hanford and Stephen Nye, and Atty. General, Wash., DC. on 08-15-75 and affdvt. of service by an individual of copies of the above papers to each of the deft. at Federal Trade Commission Bldg, Wash., DC on 08-18-75 and copies to Atty. General, Wash., DC on 08-18-75 .	
	Federal Trade Commission by N.Y. Regional Office on 08-15-75	
	copy to said deft. by ceet. mail , Wash., DC on 08-18-75	
	copy to Atty. General, Wash., DC by cert. mail on 08-18-75	
	copies to said deft. at Wash., DC by personal service on -8-18-75	
	copies to USA, SDNY by personal service on 08-18-75	
	Edward H. Levi by U.S. Atty. SDNY	
	to said deft. at Wash., DC by cert. mail on 08-15-75	
	to deft. United States of America by cert. mail to Atty. General,Wash. DC on08-18-75	
	to Atty. General , Wash., DC by personal service on 08-18-75	
	to U.S. Atty. SDNY by personal service on 08-18-75	
08-27-75	Filed Order of consolidation into 75 Civ. 4047 (CHT). TENNEY, J.	
09-05-75	Docketed Pltff.Loew's Theatres,Inc.Notice of Appeal from order of 8/28/75 which denied pltff's motion for an order staying,pending final judgment(mailed copy to AUSA Weisberg;Paul,Weiss,Rifkind,Wharton&Garrison;Arnold & Porter;Conboy,Hewitt,O'Brien&Boardman;Clifford,Warnke,Glass,McIlwain& Finney; Davis,Polk&Wardwell;Chadbourne,Parke,Whiteside&Wolff;Anderson, Russell,Kill&Olick;Patton Boggs&Blow & Grainger R.Barrett on 9/8/75) (Filed in lead case #1)	

A 10

DOCKET ENTRIES IN 75 CIV. 4051

CIVIL DOCKET
UNITED STATES DISTRICT COURT

JUDGE [redacted]

75 CIV. 4051

Jury demand date: January

D. C. Form No. 106 Rev.

TITLE OF CASE		ATTORNEYS
208-1 75 4051 08 15 75 2 890 1	Injunctive relief Declaratory Judgment	0834

AMERICAN BRANDS, INC.

For plaintiff:

CHADBOURNE, PARKE, WHITESIDE & W
30 Rockefeller Plaza
New York, N.Y. 10020
541-5800

Vs.

For defendant:

FEDERAL TRADE COMMISSION;,
ENGMAN, LEWIS A., Chairman, Federal Trade Commission;
DIXON, PAUL RAND.,
THOMPSON, MAYO J.
HANFORD, M. ELIZABETH and
NYE STEPHEN - Members, Federal Trade Commission.,
LEVI, EDWARD H. - Attorney General of the United States; and
UNITED STATES OF AMERICA

STATISTICAL RECORD	COSTS	DATE	NAME OR RECEIPT NO.	REC.
J.S. 5 mailed x	Clerk	AUG 15 1975	JL 378	
J.S. 6 mailed	Marshal			
Basis of Action: Declaratory Judgment and Injunctive Relief	Docket fee			
	Witness fees			
Action arose at:	Depositions			

Docket Entries in 75 Civ. 4051

AMERICAN BRANDS, INC., Vs. FEDERAL TRADE COMMISSION; et al

75 CIV. 4051

JUDGE TENNEY

DATE	PROCEEDINGS	Date Of Judgment
8-15-75	Filed complaint and issued summons.	
8-19-75	Filed pltffs Order to Show Cause & affdvt for a stay pending final judgment, re Section 5 of the Federal Trade Comm. Act, 15 U.S.C. §45. Ret. 8-25-75 STEWART,J	
8-19-75	Filed pltffs memo of law in support of order to show cause.	
8-19-75	Filed affdvt of service of Waldo B. Warner. (To Misc. Unit)	
8-15-75	Filed order appointing Process Server. CLERK	
8-27-75	Filed Order of Consolidation of this case UNder 75 Civ 4047 CHT.....and tith 75 Civ 4049 & 75 C 4050 7 75 C 4048 & 75 C 4052....Tenney, J. mn (Fld in 75 Civ 4047 CHT).	
09-05-75	Docketed Pltff.American Brands,Inc. Notiee of Appeal re:Order denying pltff's motion for preliminary injunctive relief staying,pending final judgment(mailed copy to AUSA Weisberg;Paul,Wei•s,Rifkind,Wharton&Garrison;Arnold&Porter;Conboy, Hewitt,O'Brien&Boardman;Clifford,Warnke,Glass,McIlwain&Finney; Davis,Polk& Wardwell;Weil,Gotshal&Manges;Patton Boggs&Blow;Grainger R.Barrett on 9/8/75) (Filed in lead case#1)	

A 12

DOCKET ENTRIES IN 75 CIV. 4052

CIVIL DOCKET

UNITED STATES DISTRICT COURT

JUDGE

Jury demand date:

75 CIV. 405

D. C. Form No. 106 Rev.

TITLE OF CASE						ATTORNEYS
208-1 75 4052	08 15575	2	890	1	Declaratory Judgment	0852

LIGGETT & MYERS INCORPORATED

For plaintiff:
LEHIGER R. BARRETT
70 Rockefeller Plaza
Borough of Manhattan
New York, New York 10019

Vs.

For defendant:

ENGMAN, LEWIS A., Chairman,
Federal Trade Commission;
DIXON, PAUL RAND.,
THOMPSON, MAYO J.,
HANFORD, M. ELIZABETH., AND
STEPHEN NYE, Members, Federal Trade
Commission; FEDERAL TRADE COMMISSION;
LEVI, EDWARD H. Attorney General of the United States;
and UNITED STATES OF AMERICA

STATISTICAL RECORD	COSTS	DATE	NAME OR RECEIPT NO.	REC.
J.S. 5 mailed x	Clerk	AUG 15 1975	56371	
J.S. 6 mailed	Marshal			
Basis of Action: stay accumulation of civil penalties pending final judgment. Injunctive relief.	Docket fee			
	Witness fees			
Action arose at:	Depositions			

Docket Entries in 75 Civ. 4052

LIGGETT & MYERS INCORPORATED Vs. ENGMAN, et al

75 CIV. 4052

JUDGE TENNEY

DATE	PROCEEDINGS	Date Order Judgment
8-15-75	Filed complt. and issued summons.	
8-15-75	Filed Order appointing person to serve process.....Clerk	
8-19-75	Filed pltffs affdvt & Show Cause Order for preliminary injunction & stay re Sec.5 of the Federal Trade Comm. Act, 15 U.S.C., Section 45. Ret. 8-25-75, Room 506, at 10 A.M....STEWART,J	
8-19-75	Filed pltffs brief in support of application for a stay.	
8-19-75	Filed affdvt of service by Edward H. Sutton. (5 Issue, Ltr)	
8-15-75	Filed Order Appointing Process Server. Clerk	
8-27-75	Filed Order Consolidating with Case into 75 Cov 4047 CHT..and also consolidated with 75 C 4049 & 75 C 4050 & 75 C 4048 & 75 C 4051...Tenney, J. mn (fld in 75 C 4047 CHT)	
9-05-75	Docketed Pltff Liggett&Myers Incorporated Notice of appeal from order filed 8/27/75 denying pltff's motion for a stay pending final judgment(mailed copy to AUSA Weisberg; Conboy,Hewitt,O'Brien&Boardman;Irving Scher;Davis, Polk&Wardwell;Daniel J.O'Neill;Paul,Weiss,Rifkind,Wharton&Garrison on 9/8/75) (Filed in lead case #1)	

VERIFIED COMPLAINT OF BROWN & WILLIAMSON TOBACCO CORPORATION

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

- -x

BROWN & WILLIAMSON TOBACCO CORPORATION,

Plaintiff,

-against-

LEWIS A. ENGMAN, Chairman, Federal Trade Commission; PAUL RAND DIXON, MAYO J. THOMPSON, M. ELIZABETH HANFORD, and STEPHEN NYE, Members, Federal Trade Commission; FEDERAL TRADE COMMISSION; EDWARD H. LEVI, Attorney General of the United States; and UNITED STATES OF AMERICA,

Defendants.

- -x

75 Civ. 4047

JUDGE TENNEY

VERIFIED COMPLAINT FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF

Plaintiff, by its attorneys, PAUL, WEISS, RIFKIND, WHARTON & GARRISON, alleges:

Parties, Jurisdiction and Venue

1. This is an action for a declaratory judgment that certain acts done and threatened to be done by the defendants in their official capacities are unauthorized by and contrary to law, and for injunctive and certain other relief.

2. This action arises under the Fifth Amendment to the Constitution of the United States, the Federal Trade Commission Act (the "Act"), 38 Stat. 717 (1914), as amended, 15 U.S.C. §§ 41 et seq., and the Administrative Procedure Act, 5 U.S.C. §§ 551 et seq. This Court has jurisdiction pursuant

to the provisions of 28 U.S.C. § 1331, 28 U.S.C. § 1337, 28 U.S.C. §§ 2201-02, and 5 U.S.C. §§ 702-06. There exists between the parties an actual controversy, justiciable in character, in respect of which plaintiff requires a declaration of its rights by this Court. The matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs.

3. Plaintiff is a corporation incorporated under the laws of the State of Delaware. Plaintiff has offices in Louisville, Kentucky, and New York, New York. Plaintiff is engaged, inter alia, in the manufacture, sale and distribution of cigarettes and other tobacco products.

4. The defendant LEWIS A. ENGMAN is the Chairman of the defendant Federal Trade Commission (the "Commission"). The defendants PAUL RAND DIXON, MAYO J. THOMPSON, M. ELIZABETH HANFORD, and STEPHEN NYE are members of the defendant Federal Trade Commission. The defendant FEDERAL TRADE COMMISSION was created and established by an Act of Congress known as the Federal Trade Commission Act, 15 U.S.C. § 41 et seq. The defendant EDWARD H. LEVI is the Attorney General of the United States, who is authorized by Section 16(a) of the Act, 15 U.S.C. § 56(a), to institute suit against plaintiff in the name of defendant UNITED STATES OF AMERICA. All individual defendants are sued in their official capacities.

5. The controversy between the parties arises over

certain of plaintiff's advertisements and promotional material for cigarettes, substantial portions of which were prepared or placed by plaintiff in this judicial district, and which were published and disseminated in this district. Venue is properly laid in this district by virtue of 28 U.S.C. § 1391 (e)(2).

Statement of the Claim

6. Beginning in about May 1971, plaintiff and certain other cigarette companies voluntarily included in certain of their cigarette advertisements a depiction of the health warning required to be placed on cigarette packages (but not in cigarette advertisements) by Section 4 of the Public Health Cigarette Smoking Act of 1969, 15 U.S.C. § 1333 ("warning statement"). On or about July 1, 1971, the Commission served on plaintiff a proposed complaint which charged that plaintiff's disclosure of the warning statement in its advertising was insufficiently clear and conspicuous and therefore was a deceptive practice prohibited by Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45. Upon information and belief, similar proposed complaints were served on five other cigarette companies. The six respondents, including plaintiff, were offered a six-month period within which to negotiate settlements of the proposed complaints.

7. Thereafter, plaintiff and the five other respondents jointly commenced intensive negotiations with the staff of the Commission which covered, inter alia, the format, type size, type style, and other minute details of the warning statement to be included in newspaper, magazine and billboard advertising, transit cards, leaflets, direct-mail circulars, programs and paperback book inserts, and the manner and extent to which the warning statement was to be depicted in point-of-sale ("POS") promotional material. The negotiations extended over many months, and culminated in six consent agreements and orders, identical as to each respondent, formally issued by the Commission on March 30, 1972 (the "Orders"). A copy of the Order applicable to plaintiff is attached hereto as Exhibit A.

8. At all relevant times plaintiff has diligently fulfilled its obligations under the Order. Plaintiff has established detailed procedures to insure that advertising and promotional material subject to the Order contain a warning statement conforming to the requirements of the Order.

9. Since the Order became effective, the warning statement in conformity with the Order has been placed by plaintiff and the other cigarette companies in thousands of newspaper and magazine advertisements, POS pieces, billboards, and in other advertising and promotional material, which are covered by the Order.

10. In August and September 1972, plaintiff and the five other companies submitted compliance reports to the Commission as required by the Orders. Plaintiff's report of its compliance with the requirements of the Order included copies of current and representative advertisements and promotional material with the warning statement printed in conformity with the terms of the Order. In December 1972, the Commission advised each of the respondents, including plaintiff, that "on the assumption that the information submitted [in the compliance report] is accurate and complete, . . . no compliance action by the Commission is indicated at this time."

11. Based upon its examination of the compliance reports and other widely disseminated cigarette advertising available to it, in a report dated December 31, 1972, the Commission publicly and officially reported to the Congress, pursuant to 15 U.S.C. § 1337, that:

> "Advertisements containing the disclosure statement in the format required by these orders began to appear in May of 1972, and by the end of October, all cigarette advertisements observed by the Commission staff were being published in accordance with the terms of these orders." (Federal Trade Commission Report to Congress, December 31, 1972, p. 4.)

12. In its next annual report to Congress, dated December 31, 1973, but actually issued on January 23, 1974, the Commission publicly and officially repeated that "by October of 1972, almost all cigarette advertising published

in this country was in compliance with the terms" of the Orders. (Federal Trade Commission Report to Congress, December 31, 1973, p. 1.)

13. Plaintiff, relying in good faith on the Commission's approval of its compliance report and on the Commission's official reports to Congress, believed that the Commission had accepted the manner in which plaintiff depicted the warning statement as fully conforming to the requirements of the Order, and plaintiff prepared and placed its advertisements and promotional materials in accordance with that reliance.

14. By letter dated May 17, 1974, the Commission's staff informed plaintiff that "The Compliance Division is instituting an inquiry into the manner of [plaintiff's] compliance" with certain provisions of the Order, and plaintiff cooperated in the ensuing investigation. In response to plaintiff's repeated requests that there should be discussions as to what would avoid future controversy regarding plaintiff's advertising and promotional materials, the staff repeatedly informed plaintiff's counsel that, as a pre-condition to such discussions, plaintiff would have to agree to join with the other five companies in a lump sum payment of about $6,000,000 as penalties for alleged past violations of the Orders. Plaintiff would not and could not accept

this demand because plaintiff had not violated the Order and the staff's demand gave no assurance that future controversy would be avoided.

15. By letters to plaintiff and the five other cigarette manufacturers dated August 1, 1975, the Commission stated that it "has determined" that plaintiff and each of the other manufacturers "ha[ve] violated" the Orders in various respects. The letter stated that the Commission had determined to commence "an action for civil penalties and other relief" with respect to certain alleged violations of the Order. With respect to other alleged violations, the Commission stated that it would "hold a civil penalty action in abeyance for 180 days," but if at the expiration of such period plaintiff had not "corrected" these violations in accordance with the Commission's demands, "civil penalties and other relief" would be sought by the Commission for such alleged violations. A copy of the Commission's letter to plaintiff is attached hereto as Exhibit B.

16. The determinations in the Commission's letter that plaintiff violated the Order are largely vague and ambiguous and, to the extent they can be understood, are based on erroneous and unwarranted interpretations of the express terms of the Order. These determinations repudiate the Commission's reports to Congress that plaintiff's advertising was in compliance with the Order,

disregard plaintiff's good faith reliance on the Commission's public statements with respect to plaintiff's advertising and promotion, and are inconsistent with the Commission's earlier acceptance of plaintiff's compliance report.

17. By reason of the provisions of Section 5 of the Act, 15 U.S.C. § 45, and paragraph 8 of the Agreement containing the order to cease and desist, the Commission's determination exposes plaintiff to the immediate and continuing threat of substantial civil penalties.

18. The Commission's August 1, 1975 letter has a direct and immediate effect on the day-to-day business of plaintiff, which advertises continually and extensively to promote the sale of its products. Plaintiff would encounter serious difficulties in altering its advertising because the Commission has never specified the corrective measures it considers necessary for compliance with the Order. Moreover, even if the Commission had informed plaintiff with sufficient specificity of the changes it believes should be made in plaintiff's advertising, compliance with the Commission's interpretation would require substantial revisions by plaintiff in millions of dollars worth of advertising and promotional materials.

19. By reason of the general and ordinary deadlines for the submission of advertising copy established by various media, it would be impossible for plaintiff forth-

with to revise all of its advertising and promotional materials. As recognized by the provisions of paragraph G of the Order (Exhibit A, at 7), lead times ranging from 45 to 180 days are required with respect to advertising and promotional copy.

20. As a result of the Commission's letter to plaintiff dated August 1, 1975, plaintiff has been put in jeopardy either of having to discontinue at great expense advertising and promotional practices which plaintiff has been advised and believes in good faith to be lawful and in compliance with the requirements of the Order, or alternatively of continuing to utilize such advertising and promotional materials at the risk of incurring enormous and ever higher-mounting civil penalties. This very real dilemma is compounded by the Commission's failure to specify sufficiently the respects in which it believes plaintiff's advertising to be in violation of the Order.

21. Plaintiff has no prompt, adequate and effective remedy at law, and the present action is the only available means for the protection of plaintiff's rights. Unless the Court grants plaintiff the relief sought herein, plaintiff will be effectively deprived of its property without due process of law, in violation of the Fifth Amendment to the United States Constitution; plaintiff will be denied the right to effective judicial review of agency action, guaran-

teed by the Administrative Procedure Act; and plaintiff will otherwise suffer irreparable injury.

WHEREFORE, plaintiff respectfully prays this Court:

(i) To issue a judgment declaring that the determinations set forth in the Commission's letter dated August 1, 1975, are inconsistent with the provisions of the Order, and are otherwise contrary to law;

(ii) To issue a judgment declaring that plaintiff is not liable for civil penalties;

(iii) To enter an order staying, pending final judgment, the accumulation of penalties under Section 5 of the Act, 15 U.S.C. § 45, for alleged violations of the Order; and

(iv) To grant such other and further relief as the Court may deem just and appropriate.

Dated: New York, N. Y.
August 14, 1975

PAUL, WEISS, RIFKIND, WHARTON
& GARRISON

By _____
Martin London
Attorneys for Plaintiff
345 Park Avenue
New York, New York 10022
Tel: (212) 644-8134

(Verified)

EXHIBIT A--CONSENT ORDER TO CEASE AND DESIST
ANNEXED TO VERIFIED COMPLAINT OF
BROWN & WILLIAMSON TOBACCO CORPORATION

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

In the Matter of	
BROWN AND WILLIAMSON TOBACCO CORPORATION, a corporation.	FILE NO. 712 3734 AGREEMENT CONTAINING CONSENT ORDER TO CEASE AND DESIST

The agreement herein by and between Brown and Williamson Tobacco Corporation, a corporation, proposed respondent in a proceeding the Federal Trade Commission intends to initiate, and its attorney, and counsel for the Federal Trade Commission, is entered into in accordance with the Commission's Rule governing consent order procedure. In accordance therewith the parties hereby agree that:

1. Proposed respondent, Brown and Williamson Tobacco Corporation, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business located at 1600 West Hill, in the City of Louisville, State of Kentucky.

2. Proposed respondent has been served with notice of the Commission's determination to issue its complaint charging it with violation of Section 5 of the Federal Trade Commission Act, and with a copy of the complaint the Commission intended to issue, together with a form of order the Commission believed warranted in the circumstances.

3. Proposed respondent admits all the jurisdictional facts set forth in the copy of the complaint here attached.

4. Proposed respondent waives:

(a) Any further procedural steps;

(b) The requirement that the Commission's decision contain a statement of findings of fact and conclusions of law; and

(c) All rights to seek judicial review or otherwise to challenge or contest the validity of the order entered pursuant to this agreement.

5. This agreement shall not become a part of the official record of the proceeding unless and until it is accepted by the Commission. If this agreement is accepted by the Commission it, together with the complaint contemplated thereby, will be placed on the public record for a period of thirty (30) days and information in respect thereto publicly released; and such acceptance may be withdrawn by the Commission if, within thirty (30) days after the acceptance, comments or views submitted to the Commission disclose facts or considerations which indicate that the order contained in the agreement is inappropriate, improper, or inadequate.

6. The Commission has not made in this proceeding any decision, adjudication or determination of any issue of law or fact presented by the complaint in this proceeding. This agreement is for settlement purposes only and does not constitute an admission by the proposed respondent that (1) the law has been violated as alleged in the said copy of the complaint hereto attached; (2) the Commission has the authority to require an affirmative statement with respect to any relationship between smoking and health in any cigarette advertising; or (3) the statement required by the order contained in the agreement is necessary or correct. It is understood that neither this settlement agreement nor compliance with the consent order shall constitute or in any way be deemed an admission in any administrative or judicial proceeding or in any private litigation. Except for the jurisdictional facts admitted in paragraph 3 above, proposed respondent denies all the allegations contained in said complaint. If respondent had not entered into the consent settlement of this proceeding in order to conserve the time and resources which would have been expended in litigation, the respondent would have answered the complaint in this proceeding in the form attached hereto.

7. This agreement contemplates that, if it is accepted by the Commission, and if such acceptance is not subsequently withdrawn by the Commission pursuant to the provision of §2.34(b) of the Commission's Rules, the Commission may, without further notice to proposed respondent, (1) issue its complaint in the form and substance of the complaint hereto attached and its decision containing the following order to cease and desist in disposition of the proceeding and (2) make information public in respect thereto. When so entered, the order to cease and desist shall have the same force and effect and shall become final and may be altered, modified or set aside in the same

manner and within the same time provided by statute for other orders; provided, however, that no part of this consent order is severable and upon the taking of any action by the Commission so as to alter, modify, or set aside this order, every defense alleged in the attached answer and all other defenses now or hereafter available to the proposed respondent may be raised. It is understood that the complaint being settled by this agreement containing the following consent order may be used by the Federal Trade Commission or any court enforcing the order in construing the terms of the order. It is further understood that the complaint or any allegations in the complaint shall not constitute an admission by respondent in any other official action, report or statement by the Federal Trade Commission, and that neither the complaint nor any allegations in the complaint shall be considered as an admission by the respondent in any other judicial or administrative proceeding or action.

8. Respondent has read the complaint and order contemplated hereby, and it understands that once the order has been issued, it will be required to file one or more compliance reports showing that it has fully complied with the order, and that it may be liable for a civil penalty of up to $5,000 for each violation of the order after it becomes final.

ORDER

I.

IT IS ORDERED that respondent Brown and Williamson Tobacco Corporation, a corporation, its successors and assigns and respondent's officers, agents, representatives and employees directly or through any corporation, subsidiary, division or other device, in connection with the offering for sale, sale or distribution of cigarettes in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from advertising any such cigarette unless respondent makes in all advertisements of such cigarette a clear and conspicuous disclosure of the statement prescribed in Section 4 of the Public Health Cigarette Smoking Act of 1969 (Public Law 91-222) which reads:

"Warning: The Surgeon General Has Determined That Cigarette Smoking Is Dangerous to Your Health."

Exhibit A Annexed to Verified Complaint of Brown & Williamson Tobacco Corporation

A. For the purposes of this Order, the term "cigarette" shall mean (A) any roll of tobacco wrapped in paper or in any substance not containing tobacco, and (B) any roll of tobacco wrapped in any substance containing tobacco which, because of its appearance, the type of tobacco used in the filler, or its packaging and labeling, is likely to be offered to, or purchased by, consumers as a cigarette described in subparagraph (A).

B. For the purposes of this Order, the term "advertisement" shall mean all advertising in newspapers, magazines, and other periodicals published and distributed in the United States and other periodicals distributed primarily to members or units of the Armed Forces of the United States located abroad, and advertisements appearing on billboards placed or located within the United States and in other materials as specified in Sections D, E, and F.

C. For the purposes of this Order, the term "clear and conspicuous disclosure" shall mean that

1. The language of the warning statement shall be precisely as prescribed by Congress in Section 4 of the Public Health Cigarette Smoking Act of 1969.

2. The warning statement shall be set in two horizontal lines parallel with the base of the advertisement, separated by leading equivalent to the lower case "x-height", excluding the ascending and descending letters, of the particular type size. In any case where the width of an advertisement in any printed medium is too narrow because of the columnar format, the warning statement may appear in three lines provided there is full compliance with all other requirements in this definition.

3. The warning statement in newspaper, magazine, and other periodical advertisements shall appear in Univers 47 (Fdy) type style. The type size to be employed shall be the following:

10-point type.....in newspaper, magazine, and other periodical advertisements of a trim size not larger than 65 square inches.

12-point type.....in newspaper, magazine, and other periodical advertisements of a trim size larger than 65 square inches but not larger than 110 square inches.

14-point type.....in newspaper, magazine, and other periodical advertisements of a trim size larger than 110 square inches but not larger than 180 square inches.

16-point type.....in newspaper, magazine, and other periodical advertisements of a trim size larger than 180 square inches.

A double full-page or a multiple full-page advertisement in any non-tabloid newspaper shall contain a separate warning statement in 16-point type on each page. A double full-page or multiple full-page advertisement in any tabloid newspaper, magazine or other periodical shall not be required to contain more than one warning statement but the type size requirement shall be determined by the total aggregated size of the entire advertisement. An advertisement which occupies one full page and part of another page in any newspaper, magazine or other periodical shall not be required to contain more than one warning statement, but the type size requirement shall be determined by the total aggregated size of the entire advertisement, and the warning statement shall appear on the full page on which the advertisement appears. An advertisement which occupies part of each of two or more pages in any newspaper, magazine or other periodical shall not be required to contain more than one warning statement, but the type size requirement shall be determined by the total aggregated size of the entire advertisement, and the warning statement shall appear on that page which contains the greater (or greatest) part of the advertisement.

4. Every warning statement shall be set in a ruled rectangle. The size of the rectangle shall be determined by providing at both ends and at both top and bottom a space between the type block and the enclosing rule not less than the following spaces: where 10-point type is used in the warning statement, the rule shall be 8-points away from the type block; where 12-point type is used in the warning statement, the rule shall be 10-points away from the type block; where 14-point type is used in the warning statement, the rule shall be 12-points away from the type block; and where 16-point type is used in the warning statement, the rule shall be 14-points away from the type block. The width of the rule enclosing the rectangle shall be 1/4-point where 10-point type is used in the warning statement; 1/2-point where 12-point type is used in the warning statement; 3/4-point where 14-point type is used in the warning statement; and 1-point where 16-point type is used in the warning statement.

5. The warning statement shall be printed in black against a solid white background within the rectangle, and the enclosing rule shall be printed in black.

6. The warning statement in its rectangle in any newspaper, magazine, or other periodical advertisement shall be a separate element in each advertisement and shall not contain or include any part of any picture, design, illustration or text within the advertisement. The warning statement in its rectangle shall not be contained or included as an integral part of any specific pictorial design or illustration; in particular, it shall not be made a constituent part of a reproduction of the package of cigarettes. The warning statement in its rectangle may be printed or superimposed upon any pictorial background portion of any advertisement.

7. The warning statement in its rectangle in any newspaper, magazine, or other periodical advertisement may be positioned anywhere within the trim area of the advertisement, but shall not be positioned in the margin of any advertisement. The rectangle shall not be positioned immediately next to, or immediately contiguous to, any rectangular designs, elements, or similar geometric forms (other than a picture of the cigarette package) or immediately contiguous to any textual matter appearing in the advertisement.

8. Blurring or illegibility of the warning statement in its rectangle occurring for reasons beyond the control of the respondent shall not be in violation of this Order.

D. On billboards of a size 24-sheets and larger, the type size of the warning statement shall be not less than 2 inches in height, and the rectangle and the enclosing rule shall be of a size, shape, contrast, and placement, proportionately corresponding to those specified in Subsections C-1, -2, -4, -5, -6, and -7 for newspaper, magazine, and other periodical advertisements of a trim size larger than 180 square inches. On billboards of a size 6-, 7-, and 8-sheets the type size shall be not less than 3/4 inches, on those of a size 2- through 5-sheets the type size shall be not less than 1/2 inch, and the rectangle and the enclosing rule shall be of a size, shape, contrast and placement, proportionately corresponding to those specified in Subsections C-1, -2, -4, -5, -6, and -7 for newspaper, magazine, and other periodical advertisements of a trim size larger than 180 square inches. On 1-sheet billboards the type size shall be not less than 24-points, and the rectangle and the enclosing rule shall be of a size, shape, contrast and placement, proportionately corresponding to those specified in Subsections C-1, -2, -4, -5, -6 and -7 for newspaper, magazine, and other periodical advertisements of a trim size larger than 180 square inches. On all public transit side cards of any shape the type size shall be

not less than 18-points, and the rectangle and the enclosing rule shall be of a size, shape, contrast and placement, proportionately corresponding to those specified in Subsections C-1, -2, -4, -5, -6, and -7 for newspaper, magazine, and other periodical advertisements of a trim size larger than 180 square inches. All public transit end cards shall comply with the minimum requirements for 1-sheet billboards. The type style on any billboard or transit card shall be Univers 47 (Fdy) or a similar font.

E. On all point-of-sale promotional materials exhibited to cigarette purchasers, which have a surface containing an advertising display area of more than 36 square inches, the warning statement within its rectangle shall be included in a type size proportional to the type size specified in the nearest page size category for newspaper, magazine, and other periodical advertisements, as specified in Subsections C-1, -2, -3, -4, -5, -6, and -7. In determining the size of the advertising display area in point-of-sale promotional materials consisting of two or more pages, the total advertising display area of each page on which any printed or graphic material appears shall be aggregated, and where the aggregate of the advertising display area, on which any printed or graphic material appears, exceeds 36 square inches, the warning statement within its rectangle shall be placed on one of those pages and proportionalized to the size of that page in accordance with Section C. The warning statement shall not be required on any non-media advertising and promotional materials offered or given to consumers; nor shall the warning statement be required on any promotional materials which are not for public display or public consumer exposure, and are distributed to cigarette wholesalers, dealers, and merchants.

F. All advertising contained in non-point-of-sale leaflets, direct-mail circulars, paperback book inserts, and programs shall contain the warning statement within its rectangle in a type size proportional to the type size specified in the nearest page size category for newspaper, magazine, and other periodical advertisements, as specified in Subsections C-1, -2, -3, -4, -5, -6, and -7.

G. Sections C, D, E, and F of this Order shall become effective sixty (60) days after it is finally issued, but to meet the general and ordinary deadlines for submission of advertising copy established by the medium by or in which the advertisement is to appear, the requirements of Sections C, D, E, and F shall not be applicable (a) to newspaper, magazine, or other periodical advertising for which the closing date on which an advertiser must, according to the regular schedule of that newspaper, magazine, or other periodical, deliver the advertising material

in final form to the printer, to the publisher, or as to spectacolor-type, to the production house, is less than forty-five (45) days after the date on which this Order shall become effective; (b) to advertising appearing on billboards for which copy must, according to the earliest practical date for replacement, be delivered in final form to the printer or painted or assembled on such billboards less than forty-five (45) days after the date on which this Order shall become effective, but in any event, as to advertising appearing on billboards Sections C, D, E, and F shall become applicable one hundred eighty (180) days from the date this Order shall become effective; (c) to advertising printed on non-point-of-sale leaflets, direct-mail circulars, paperback book inserts, and programs which is delivered in final form to the printer less than forty-five (45) days after the date on which this Order shall become effective, but in any event, as to advertising printed on non-point-of-sale leaflets, direct-mail circulars, paperback book inserts, and programs, Sections C, D, E, and F shall become applicable one hundred forty (140) days from the date this Order shall become effective; or (d) to point-of-sale promotional materials exhibited to cigarette purchasers, which have a surface containing an advertising display area of more than 36 square inches, delivered in final form to the printer less than forty-five (45) days from the date this Order shall become effective.

H. This Order shall not be applicable to signs on factories, plants, warehouses, and other facilities related to the manufacture or factory storage of cigarettes. to corporate or financial reports, or to employment advertising, or to advertising in tobacco trade publications not circulated to consumers.

II.

IT IS FURTHER ORDERED that the respondent corporation shall forthwith distribute a copy of this order to each of its operating divisions or departments.

IT IS FURTHER ORDERED that respondent notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order.

IT IS FURTHER ORDERED that respondent shall, within sixty (60) days after service upon it of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with the order to cease and desist.

Signed this day of

BROWN AND WILLIAMSON TOBACCO CORPORATION

By_____
E.P. Finch
President

APPROVED:

_____
Gerald J. Thain
Assistant Director for
National Advertising

_____
Robert Pitofsky
Director, Bureau of
Consumer Protection

_____
Allen F. Brauninger

_____
Patrick E. Power

_____
Gale T. Miller

Counsel for the Federal Trade Commission

Exhibit A Annexed to Verified Complaint of Brown & Williamson Tobacco Corporation

In the Matter of H & R Enterprises, Inc., a Corporation, and Walter B. Harrison, Individually and as an Officer of Said Corporation

Wash., school offering courses in computer card key punch training to cease representing that its programs are for the purpose of offering employment to qualified applicants, that the salaries of its graduates will be above average, that respondents have been retained by companies to train key punch operators, and minimizing the time required to obtain a certificate.

The order to cease and desist, including further order requiring report of compliance therewith, is as follows:

It is ordered, That respondents H & R Enterprises, Inc., a corporation, and its officers, and Walter B. Harrison, individually and as an officer of said corporation, and their successors and assigns and respondents' officers, agents, representatives, and employees directly, or through any corporation, subsidiary, division, or other device in connection with the advertising, offering for sale, sale or distribution of courses of study, training, or instruction in the field of key punch training or any other subject, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, orally or in writing, directly or by implication, that:

1. Inquiries are solicited for the purpose of offering employment to qualified applicants.

2. Upon completion of respondents' course and by virtue thereof, graduates will obtain employment with a starting salary in excess of those obtained by the average graduate of respondents' courses of instruction.

3. The respondents have been retained by companies to train key punch operators for them.

4. Key punch operators will normally complete their training in a few short weeks, 8 to 12 weeks, after a short training period, or other period of time that is less than the average or mean time required by respondents' graduates to obtain the proficiency required to obtain a certificate from respondents.

It is further ordered, That the respondent corporation shall forthwith distribute a copy of this order to any operating divisions organized and operated after the date hereof.

It is further ordered, That respondents deliver a copy of this order to cease and desist to all future personnel of respondents engaged in the offering for sale or sale of any course of instruction or in any aspect of preparation, creation, or placing of advertising, and that respondents secure a signed statement acknowledging receipt of said order from each such person.

It is further ordered, That respondents notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment, or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order.

[illegible] after service upon them of this order, file with the Commission a report in writing setting forth in detail the manner and form in which they have complied with this order.

Issued: March 31, 1972.

By the Commission.

[SEAL] CHARLES A. TOBIN, *Secretary.*

[FR Doc 72-6873 Filed 5-4-72;8:47 am]

[Docket No. C-2180, etc.]

PART 13—PROHIBITED TRADE PRACTICES

Lorillard et al.

Subpart—Advertising falsely or misleadingly: § 13.195 *Safety:* 13.195–60 Product. Subpart—Neglecting, unfairly or deceptively, to make material disclosure: § 13.1800 *Safety.*

(Sec. 6, 38 Stat. 721; 15 U.S.C. 46. Interprets or applies sec. 5, 38 Stat. 719, as amended; 15 U.S.C. 45) [Cease and desist orders, Lorillard et al., New York, N.Y., et al., Dockets Nos. C-2180 et al., Mar. 30, 1972]

In the Matter of Lorillard, a Division of Loew's Theatres, Inc., a Corporation, Docket No. C-2180; Philip Morris, Inc., a Corporation, Docket No. C-2181; American Brands, Inc., a Corporation, Docket No. C-2182; Brown and Williamson Tobacco Corp., a Corporation, Docket No. C-2183; R. J. Reynolds Tobacco Co., a Corporation, Docket No. C-2184; Liggett & Myers, Inc., a Corporation, Docket No. C-2185

Consent orders requiring six major cigarette manufacturers and distributors to include in all their cigarette advertisements a clear and conspicuous disclosure of the statement: "Warning: The Surgeon General Has Determined That Cigarette Smoking Is Dangerous To Your Health." The orders further provide the manner in which the statement shall be presented in newspapers, magazines, and other periodical advertising, on billboards, on all point-of-sale promotional materials, and on all non-point-of-sale materials. The orders are not applicable to signs on factories, plants and warehouses, in financial reports, and in trade publications not circulating to consumers.

The orders to cease and desist, including further orders requiring reports of compliance, are as follows:

I: *It is ordered*, That each of the respondents named in the caption, a corporation, its successors and assigns and respondent's officers, agents, representatives and employees directly or through any corporation, subsidary, division or other device, in connection with the offering for sale, sale, or distribution of cigarettes in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from advertising [illegible] unless [illegible] on all packages [illegible] of such cigarettes and on all [illegible] Health Cigarette Labeling Act of 1969 (Public Law 91-222) which reads:

Warning: The Surgeon General has determined that cigarette smoking is dangerous to your health.

A. For the purposes of this order, the term "cigarette" shall mean (A) any roll of tobacco wrapped in paper or in any substance not containing tobacco, and (B) any roll of tobacco wrapped in any substance containing tobacco which, because of its appearance, the type of tobacco used in the filler, or its packaging and labeling, is likely to be offered to, or purchased by, consumers as a cigarette described in subparagraph (A).

B. For the purposes of this order, the term "advertisement" shall mean all advertising in newspapers, magazines, and other periodicals published and distributed in the United States and other periodicals distributed primarily to members or units of the Armed Forces of the United States located abroad, and advertisements appearing on billboards placed or located within the United States and in other materials as specified in sections D, E, and F.

C. For the purposes of this order, the term "clear and conspicuous disclosure" shall mean that:

1. The language of the warning statement shall be precisely as prescribed by Congress in section 4 of the Public Health Cigarette Smoking Act of 1969.

2. The warning statement shall be set in two horizontal lines parallel with the base of the advertisement, separated by leading equivalent to the lower case "x-height", excluding the ascending and descending letters, of the particular type size. In any case where the width of an advertisement in any printed medium is too narrow because of the columnar format, the warning statement may appear in three lines provided there is full compliance with all other requirements in this definition

3. The warning statement in newspaper, magazine, and other periodical advertisements shall appear in Univers 47 (Foundry) type style. The type size to be employed shall be the following:

10-point type....In newspaper, magazine, and other periodical advertisements of a trim size not larger than 65 square inches.
12-point type....In newspaper, magazine, and other periodical advertisements of a trim size larger than 65 square inches but not larger than 110 square inches.
14-point type....In newspaper, magazine, and other periodical advertisements of a trim size larger than 110 square inches but not larger than 150 square inches.
16-point type....In newspaper, magazine, and other periodical advertisements of a trim size larger than 150 square inches.

A double full-page or a multiple full-page advertisement in any nontabloid newspaper shall contain a separate warning statement in 16-point type on each page. A double full-page or multiple full-page advertisement in any tabloid newspaper,

magazine, or other periodical shall not be required to contain more than one warning statement but the type size requirement shall be determined by the total aggregated size of the entire advertisement.

An advertisement which occupies one full page and part of another page in any newspaper, magazine, or other periodical shall not be required to contain more than one warning statement, but the type size requirement shall be determined by the total aggregated size of the entire advertisement, and the warning statement shall appear on the full page on which the advertisement appears. An advertisement which occupies part of each of two or more pages in any newspaper, magazine, or other periodical shall not be required to contain more than one warning statement, but the type size requirement shall be determined by the total aggregated size of the entire advertisement, and the warning statement shall appear on that page which contains the greater (or greatest) part of the advertisement.

4. Every warning statement shall be set in a ruled rectangle. The size of the rectangle shall be determined by providing at both ends and at both top and bottom a space between the type block and the enclosing rule not less than the following spaces: Where 10-point type is used in the warning statement, the rule shall be 8 points away from the type block; where 12-point type is used in the warning statement, the rule shall be 10 points away from the type block; where 14-point type is used in the warning statement, the rule shall be 12 points away from the type block; and where 16-point type is used in the warning statement, the rule shall be 14 points away from the type block. The width of the rule enclosing the rectangle shall be ¼ point where 10-point type is used in the warning statement; ½ point where 12-point type is used in the warning statement; ¾ point where 14-point type is used in the warning statement; and 1 point where 16-point type is used in the warning statement.

5. The warning statement shall be printed in black against a solid white background within the rectangle, and the enclosing rule shall be printed in black.

6. The warning statement in its rectangle in any newspaper, magazine, or other periodical advertisement shall be a separate element in each advertisement and shall not contain or include any part of any picture, design, illustration, or text within the advertisement. The warning statement in its rectangle shall not be contained or included as an integral part of any specific pictorial design or illustration; in particular, it shall not be made a constituent part of a reproduction of the package of cigarettes. The warning statement in its rectangle may be printed or superimposed upon any pictorial background portion of any advertisement.

7. The warning statement in its rectangle in any newspaper, magazine, or [illegible] positioned anywhere within the trim area of the advertisement, but shall not be positioned in the margin of any advertisement. The rectangle shall not be positioned immediately next to, or immediately contiguous to, any rectangular designs, elements, or similar geometric forms (other than a picture of the cigarette package) or immediately contiguous to any textual matter appearing in the advertisement.

8. Blurring or illegibility of the warning statement in its rectangle occurring for reasons beyond the control of the respondent shall not be in violation of this order.

D. On billboards of a size 24 sheets and larger, the type size of the warning statement shall be not less than 2 inches in height, and the rectangle and the enclosing rule shall be of a size, shape, contrast, and placement, proportionately corresponding to those specified in subsections C–1, –2, –4, –5, –6, and –7 for newspaper, magazine, and other periodical advertisements of a trim size larger than 180 square inches. On billboards of a size 6, 7, and 8 sheets the type size shall be not less than ¾ inches, on those of a size 2 through 5 sheets the type size shall be not less than ½ inch, and the rectangle and the enclosing rule shall be of a size, shape, contrast and placement, proportionately corresponding to those specified in subsections C–1, –2, –4, –5, –6, and –7 for newspaper, magazine, and other periodical advertisements of a trim size larger than 180 square inches. On 1-sheet billboards the type size shall be not less than 24 points, and the rectangle and the enclosing rule shall be of a size, shape, contrast and placement, proportionately corresponding to those specified in subsections C–1, –2, –4, –5, –6, and –7 for newspaper, magazine, and other periodical advertisements of a trim size larger than 180 square inches. On all public transit side cards of any shape the type size shall be not less than 18 points, and the rectangle and the enclosing rule shall be of a size, shape, contrast and placement, proportionately corresponding to those specified in subsections C–1, –2, –4, –5, –6, and –7 for newspaper, magazine, and other periodical advertisements of a trim size larger than 180 square inches. All public transit end cards shall comply with the minimum requirements for 1-sheet billboards. The type style on any billboard or transit card shall be Univers 47 (Boundry) or a similar font.

E. On all point-of-sale promotional materials exhibited to cigarette purchasers, which have a surface containing an advertising display area of more than 36 square inches, the warning statement within its rectangle shall be included in a type size proportional to the type size specified in the nearest page size category for newspaper, magazine, and other periodical advertisements, as specified in subsections C–1, –2, –3, –4, –5, –6, and –7. In determining the size of the advertising display area in point-of-sale promotional materials consisting of [illegible] display area of each panel on which any printed or graphic material appears shall be aggregated, and where the aggregate of the advertising display area, on which any printed or graphic material appears, exceeds 36 square inches, the warning statement within its rectangle shall be placed on one of those pages and proportionalized to the size of that page in accordance with section C. The warning statement shall not be required on any nonmedia advertising and promotional materials offered or given to consumers; nor shall the warning statement be required on any promotional materials which are not for public display or public consumer exposure, and are distributed to cigarette wholesalers, dealers, and merchants.

F. All advertising contained in non-point-of-sale leaflets, direct-mail circulars, paperback book inserts, and programs shall contain the warning statement within its rectangle in a type size proportional to the type size specified in the nearest page size category for newspaper, magazine, and other periodical advertisements, as specified in subsections C–1, –2, –3, –4, –5, –6, and –7.

G. Sections C, D, E, and F of this Order shall become effective sixty (60) days after it is finally issued, but to meet the general and ordinary deadlines for submission of advertising copy established by the medium by or in which the advertisement is to appear, the requirements of sections C, D, E, and F shall not be applicable (a) to newspaper, magazine, or other periodical advertising for which the closing date on which an advertiser must, according to the regular schedule of [illegible] newspaper, magazine, or other periodical, deliver the advertising material in final form to the printer, to the publisher, or as to spectacolor-type, to the production house, is less than forty-five (45) days after the date on which this order shall become effective; (b) to advertising appearing on billboards for which copy must, according to the earliest practical date for replacement, be delivered in final form to the printer or painted or assembled on such billboards less than forty-five (45) days after the date on which this order shall become effective, but in any event, as to advertising appearing on billboards, sections C, D, E, and F shall become applicable one hundred eighty (180) days from the date this order shall become effective; (c) to advertising printed on non-point-of-sale leaflets, direct-mail circulars, paperback book inserts, and programs which is delivered in final form to the printer less than forty-five (45) days after the date on which this order shall become effective, but in any event, as to advertising printed on non-point-of-sale leaflets, direct-mail circulars, paperback book inserts, and programs, [illegible] C, D, E, and F shall become applicable one hundred forty (140) days from the date this order shall become effective; or (d) to point-of-sale promotional materials exhibited to cigarette purchasers, which have a surface containing [illegible] 36 square inches, under which

[illegible] days from the date [illegible]

[illegible] this order shall not be applicable [illegible] to the warehousing or factory storage of cigarettes, to corporate or financial reports, or to employment advertising, or to advertising in tobacco trade publications not circulated to consumers.

II. *It is further ordered*, That each of the respondent corporations shall forthwith distribute a copy of this order to each of its operating divisions or departments.

It is further ordered, That each of the respondents notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order.

It is further ordered, That each of the respondents shall, within sixty (60) days after service upon it of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with the order to cease and desist.

Issued: March 30, 1972.

By the Commission; Commissioner Jones' statement is attached.[1]

(SEAL) CHARLES A. TOBIN, *Secretary.*

[FR Doc.72-6371 Filed 5-4-72;8:47 am]

[Docket No. 7453]

PART 13—PROHIBITED TRADE PRACTICES

National Tea Co.

Subpart—Acquiring corporate stock or assets: § 13.5 *Acquiring corporate stock or assets:* 13.5-20 Business methods and policies.

(Sec. 6, 38 Stat. 721; 15 U.S.C. 46. Interpret or apply sec. 5, 38 Stat. 719, as amended; sec. 7, 38 Stat. 731, as amended; 15 U.S.C. 45, 18) [Modified order, National Tea Co., Chicago, Ill., Docket No. 7453, Mar. 21, 1972]

In the Matter of National Tea Co., a Corporation

Order reopening and modifying an earlier order, 30 F.R. 6300, dated March 4, 1966, which prohibited petitioner from acquiring stock of other food product retailers for a period of 10 years by bringing its provisions more into line with orders involving other food chains issued since 1967.

The modified order to cease and desist, including further order requiring report of compliance therewith is as follows:

It is ordered That for a period of ten (10) years from May 4, 1966, National Tea Co. shall not (A) merge with or acquire, directly or indirectly, through subsidiaries, or in any other manner, except with the prior approval of the Commission upon written application, the whole [illegible] engaged in the retail sale of food products, as defined in Standard Industrial Classification Manual, 1967 revision, or a grocery department in a national store, where such acquisition or merger involves (1) five or more grocery stores, (2) annual grocery store sales of more than five (5) million dollars, or (3) combined (respondent and the grocery stores to be acquired or merged) grocery store sales of more than five (5) percent of total grocery or foodstore sales in any city or county in the United States; and (B) without sixty (60) days prior notification to the Commission, merge with or acquire, directly or indirectly, through subsidiaries or in any other manner, any grocery store establishment for which prior approval is not required pursuant to subparagraph A.

Within thirty (30) days from the effective date of this order, and annually thereafter until it has fully complied with this order, National Tea Co. shall submit a verified written report to the Federal Trade Commission setting forth in detail the manner and form in which it intends to comply, is complying, or has complied with this order.

It is further ordered, That petitioner's request that confidential treatment be accorded those tables and charts which it has designated "Confidential" be, and it hereby is, granted.

Issued: March 23, 1972.

By the Commission.

(SEAL) CHARLES A. TOBIN, *Secretary.*

[FR Doc.72-6375 Filed 5-4-72;8:47 am]

Title 50—WILDLIFE AND FISHERIES

Chapter I—Bureau of Sport Fisheries and Wildlife, Fish and Wildlife Service, Department of the Interior

PART 28—PUBLIC ACCESS, USE AND RECREATION

Brigantine National Wildlife Refuge, N.J.

The following special regulation is issued and is effective on date of publication in the FEDERAL REGISTER (5-5-72).

§ 28.28 Special regulations, public access, use, and recreation; for individual wildlife refuge areas.

NEW JERSEY

BRIGANTINE NATIONAL WILDLIFE REFUGE

Public access, during daylight hours, for the purpose of nature study, wildlife observation, photography, picnicking, hiking, swimming, and sunbathing is permitted. Access on foot is permitted except in areas posted as closed, and by motor vehicle on designated travel routes. [illegible] posted as closed, and by motor vehicle on designated travel routes, are delineated on [illegible] Refuge headquarters, Oceanville, N.J., and from the Regional Director, Bureau of Sport Fisheries and Wildlife, U.S. Post Office and Courthouse, Boston, Mass. 02109.

The provisions of this special regulation supplement the regulations governing recreation on wildlife refuge areas generally, as set forth in Title 50, Code of Federal Regulations, Part 28, and are effective through December 31, 1972.

WILLARD M. SPAULDING, Jr.,
Acting Regional Director, Bureau of Sport Fisheries and Wildlife.

APRIL 28, 1972.

[FR Doc.72-6377 Filed 5-4-72;8:48 am]

PART 33—SPORT FISHING

Brigantine National Wildlife Refuge, N.J.

The following special regulation is issued and is effective on date of publication in the FEDERAL REGISTER (5-5-72).

§ 33.5 Special regulations; sport fishing; for individual wildlife refuge areas.

NEW JERSEY

BRIGANTINE NATIONAL WILDLIFE REFUGE

Saltwater sport fishing is permitted from the sand beach on Holgate Peninsula and Little Beach Island on the Brigantine National Wildlife Refuge through December 31, 1972, except from those areas posted as closed.

Freshwater sport fishing from the South Dike of the West Pool is permitted during daylight hours from July 20 through September 21, 1972. The possession of fish or minnows for use as bait is prohibited. Parking by freshwater fishermen is permitted at the [illegible] Visitors and South Tower parking [illegible].

Sport fishing shall be [illegible] accordance with all applicable State regulations.

Areas open to sport fishing, comprising 7.5 miles of tidal shoreline and one mile of freshwater shoreline, are delineated on maps available at refuge headquarters, Oceanville, N.J., and from the Regional Director, Bureau of Sport Fisheries and Wildlife, U.S. Post Office and Courthouse, Boston, Mass. 02109.

The provisions of this special regulation supplement the regulations which govern fishing on wildlife refuge areas generally, as set forth in Title 50, Code of Federal Regulations, Part 33, and are effective through December 31, 1972.

WILLARD M. SPAULDING, Jr.,
Acting Regional Director, Bureau of Sport Fisheries and Wildlife.

APRIL 28, 1972.

[FR Doc.72-6378 Filed 5-4-72;8:48 am]

[1] Copies of the statement may be obtained at Federal Trade Commission Building, Room 130, Sixth and Pennsylvania Avenue NW.

EXHIBIT B--COMMISSION'S LETTER AUGUST 1, 1975
ANNEXED TO VERIFIED COMPLAINT OF BROWN
& WILLIAMSON TOBACCO CORPORATION

FEDERAL TRADE COMMISSION
WASHINGTON, D. C. 20580

OFFICE OF THE SECRETARY

AUG 1 1975

Brown and Williamson Tobacco Corporation
1600 West Hill Street
Louisville, Kentucky 40201

Attention: DeBaun Bryant, Esquire
General Counsel

Re: Brown and Williamson Tobacco Corporation
Docket No. C-*183

Dear Mr. Bryant:

The Federal Trade Commission has determined that Brown and Williamson Tobacco Corporation has violated the above-captioned order by failing in certain cigarette advertisements to disclose the required health warning and by failing in other cigarette advertisements to disclose the health warning in the clear and conspicuous manner that is required by the order.

The Commission will, therefore, pursuant to the provisions of 15 U.S.C. 56(a)(1), notify the Attorney General of its intention to commence for these violations an action for civil penalties and other relief. For certain other violations of the order, the Commission will hold a civil penalty action in abeyance for 180 days. If, however, at the expiration of that period, Brown and Williamson Tobacco Corporation has not corrected these other violations, the Commission will seek civil penalties and other relief for them as well.

The Commission will immediately notify the Department of Justice of its intention to file a complaint for the following violations of the order:

1) The advertisement of cigarettes on display panels inserted since July 1972 into vending machines which fail to disclose the required health warning in violation of Section I-E of the order.

2) The advertisement of cigarettes on other promotional materials exhibited to the public since July, 1972, such as counter racks and the Kool calendar which fail to disclose the health warning or which disclose the health warning in a type size smaller than that required for the entire advertising display area, in violation of Sections I-E or I-F of the order.

3) The advertisement of cigarettes in newspapers, magazines or other periodicals published and distributed in the United States since July, 1972, which appeared to the public with a disclosure of the health warning in a type style or type size smaller than that required for the advertisement's trim size; or, as for example, various Raleigh, Belair and Kool advertisements, which positioned the warning rectangle immediately next to, or immediately contiguous to, other rectangular designs, elements or similar geometric forms, in violation of Section I-C of the order.

4) Foreign language cigarette advertisements published and distributed, or otherwise exhibited to the public, since November 13, 1973, which violate the order by disclosing the health warning in a language different from that principally used by the advertisement or in an inaccurate translation of the statement prescribed by Congress in Section 4 of the Public Health Cigarette Smoking Act of 1969.

The Commission has also determined that Brown and Williamson Tobacco Corporation has failed to disclose the health warning on billboard and transit card advertisements clearly and conspicuously as required by the order. Section I-D of the order specifies minimum type sizes for different sizes of billboards and transit cards. Compliance with that provision, however, does not satisfy the overriding requirement established by the order that in these media the disclosure must be clear

and conspicuous. Disclosures which conform to the minimum size provisions of Section I-D but which nonetheless are not of sufficient size for the warning to be read by those who view the advertisement cannot be deemed to comply with the order.

Moreover, the Commission has also determined that the typographic composition of the health warning utilized by your company violates Sections I-C-2 and I-C-4 of the order by measuring the requisite leading and spacing distances from the type faces and not from the type shoulders.

The Commission will not, however, immediately initiate a civil penalty action regarding violations pertaining to the size of the warning on billboards and transit cards or pertaining to the typographic requirements for the leading and spacing of the warning if those violations are remedied within 180 days from receipt of this order.

The Commission received and carefully considered your company's Statement of Position prior to making its determination in this matter.

By direction of the Commission.

Chas. A. Tobin

Charles A. Tobin
Secretary

cc: H. Thomas Austern, Esquire
c/o Covington & Burling
888 - 16th Street, N. W.
Washington, D. C. 20006

Horace R. Kornegay, Esquire
c/o The Tobacco Institute, Inc.
1776 K Street, N. W.
Washington, D. C. 20006

VERIFIED COMPLAINT OF PHILIP MORRIS INCORPORATED

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

PHILIP MORRIS INCORPORATED, 100 Park Avenue New York, New York, a Virginia corporation, Plaintiff,	
- v -	75 Civ. _____
LEWIS A. ENGMAN, Chairman, Federal Trade Commission; PAUL RAND DIXON, MAYO J. THOMPSON, M. ELIZABETH HANFORD, and STEPHEN NYE, Members, Federal Trade Commission; FEDERAL TRADE COMMISSION; EDWARD H. LEVI, Attorney General of the United States; and UNITED STATES OF AMERICA, Defendants.	VERIFIED COMPLAINT FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF

Plaintiff, Philip Morris Incorporated, for its Complaint herein, alleges as follows:

Parties, Jurisdiction and Venue

1. This is an action for a declaratory judgment that certain acts done and threatened to be done by the defendants in their official capacities are unauthorized by and contrary to law, and for injunctive and certain other relief.

2. This action arises under the Fifth Amendment to the Constitution of the United States, the Federal Trade Commission

Act (the "Act"), 38 Stat. 717 (1914), as amended, 15 U.S.C §§ 41 et seq., and the Administrative Procedure Act, 5 U.S.C. §§ 551 et seq. This Court has jurisdiction pursuant to the provisions of 28 U.S.C. § 1331, 28 U.S.C. § 1337, 28 U.S.C. §§ 2201-02, and 5 U.S.C. §§ 702-06. There exists between the parties an actual controversy, justiciable in character, in respect of which plaintiff requires a declaration of its rights by this Court. The matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs.

3. Plaintiff PHILIP MORRIS INCORPORATED is a corporation incorporated under the laws of the Commonwealth of Virginia. Plaintiff's principal offices are located in New York, New York at 100 Park Avenue. Plaintiff is engaged, inter alia, in the manufacture, sale and distribution of cigarettes and other tobacco products.

4. The defendant LEWIS A. ENGMAN is the Chairman of the Federal Trade Commission (the "Commission"). The defendants PAUL RAND DIXON, MAYO J. THOMPSON, M. ELIZABETH HANFORD, and STEPHEN NYE are members of the Federal Trade Commission. The defendant FEDERAL TRADE COMMISSION is an agency of the United States government created and established by an Act of Congress known as the Federal Trade Commission Act, 38 Stat. 717 (1914), as amended, 15 U.S.C. §§ 41 et seq. The defendant EDWARD H. LEVI is the Attorney

General of the United States, who is authorized by Section 16(a)(1) of the Act, 15 U.S.C. § 56(a)(1), to institute suit against plaintiff in the name of defendant UNITED STATES OF AMERICA. All individual defendants are sued in their official capacities.

5. The controversy between the parties arises over certain of plaintiff's advertisements and promotional material for cigarettes, substantial portions of which were prepared or placed by plaintiff in this judicial district, and which were published and disseminated in this district. Venue is properly laid in this district by virtue of 28 U.S.C. § 1391(e)(2).

Statement of the Claim

6. Beginning on about April 15, 1971, plaintiff and certain other cigarette companies voluntarily included in certain of their cigarette advertisements a depiction of the health warning required to be placed on cigarette packages (but not in cigarette advertisements) by Section 4 of the Public Health Cigarette Smoking Act of 1969, 15 U.S.C. § 1333 ("warning statement"). On or about July 1, 1971, the Commission served on plaintiff a proposed complaint which charged that plaintiff's disclosure of the warning statement in its advertising was insufficiently clear and conspicuous and therefore was a deceptive practice prohibited by Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45. Similar proposed complaints were

served on five other cigarette companies. The six respondents, including plaintiff, were offered a six-month period within which to negotiate settlements of the proposed complaints.

7. Thereafter, plaintiff and the five other respondents jointly commenced intensive negotiations with the staff of the Commission which covered, inter alia, the format, type size, type style, and other minute details of the warning statement to be included in newspaper, magazine and billboard advertising, transit cards, leaflets, direct-mail circulars, programs and paperback book inserts, and the manner and extent to which the warning statement was to be depicted in point-of-sale ("POS") promotional material. The negotiations extended over many months, and culminated in six consent agreements and orders, identical as to each respondent, formally issued by the Commission on March 30, 1972 (the "Orders"). A copy of the Order applicable to plaintiff is attached hereto as Exhibit A.

8. At all relevant times plaintiff has diligently fulfilled its obligations under the Order. Plaintiff has established detailed procedures to insure that advertising and promotional material subject to the Order contain a warning statement conforming to the requirements of the Order.

9. Since the Order became effective, the warning statement in conformity with the Order has been placed by plaintiff

and the other cigarette companies in thousands of newspaper and magazine advertisements, POS pieces and billboards, and in other advertising and promotional material, which are covered by the Order.

10. In August and September 1972, plaintiff and the five other companies submitted compliance reports to the Commission as required by the Orders. Plaintiff's report of its compliance with the requirements of the Order included copies of current and representative advertisements and promotional material with the warning statement printed in conformity with the terms of the Order. In December 1972, the Commission advised each of the respondents, including plaintiff, that "on the assumption that the information submitted [in the compliance report] is accurate and complete, . . . no compliance action by the Commission is indicated at this time."

11. Based upon its examination of the compliance reports and other widely disseminated cigarette advertising available to it, in a report dated December 31, 1972, the Commission publicly and officially reported to the Congress, pursuant to 15 U.S.C. § 1337, that:

> "Advertisements containing the disclosure statement in the format required by these orders began to appear in May of 1972, and by the end of October, all cigarette advertisements observed by the Commission staff were being published in

accordance with the terms of these orders." (Federal Trade Commission Report to Congress, December 31, 1972, p. 4.)

12. In its next annual report to Congress, dated December 31, 1973, but actually issued on January 23, 1974, the Commission publicly and officially repeated that "by October of 1972, almost all cigarette advertising published in this country was in compliance with the terms" of the Orders. (Federal Trade Commission Report to Congress, December 31, 1973, p. 1.)

13. Plaintiff, relying in good faith on the Commission's approval of its compliance report and on the Commission's official reports to Congress, believed that the Commission had accepted the manner in which plaintiff depicted the warning statement as fully conforming to the requirements of the Order, and plaintiff prepared and placed its advertisements and promotional material in accordance with that reliance.

14. By letter dated April 22, 1974, the Commission's staff informed plaintiff that "The Compliance Division is instituting an inquiry into the manner of [plaintiff's] compliance" with certain provisions of the Order, and plaintiff cooperated in the ensuing investigation. In response to plaintiff's repeated requests that there should be discussions as to what would avoid future controversy regarding plaintiff's advertising and promotional materials, the staff repeatedly informed plaintiff's

Counsel that, as a pre-condition to such discussions, plaintiff would have to join with the other five companies in a lump sum payment of about six million dollars as penalties for alleged past violations of the Order. Plaintiff would not and could not accept this demand because plaintiff had not violated the Order and the staff's demand gave no assurance that future controversy would be avoided.

15. By letters to plaintiff and the five other cigarette manufacturers dated August 1, 1975, the Commission stated that it "has determined" that plaintiff and each of the other manufacturers "ha[ve] violated" the Orders in various respects. The letter stated that the Commission had determined to commence "an action for civil penalties and other relief" with respect to certain alleged violations of the Order. With respect to other alleged violations, the Commission stated that it would "hold a civil penalty action in abeyance for 180 days," but if at the expiration of such period plaintiff had not "corrected" these violations in accordance with the Commission's demands, "civil penalties and other relief" would be sought by the Commission for such alleged violations. A copy of the Commission's letter to plaintiff is attached hereto as Exhibit B.

16. The determinations in the Commission's letter that plaintiff violated the Order are largely vague and ambiguous and,

to the extent they can be understood, are based on erroneous and unwarranted interpretations of the express terms of the Order. These determinations repudiate the Commission's reports to Congress that plaintiff's advertising was in compliance with the Order, disregard plaintiff's good faith reliance on the Commission's public statements with respect to plaintiff's advertising and promotion, and are inconsistent with the Commission's earlier acceptance of plaintiff's compliance report.

17. By reason of the provisions of Section 5 of the Act, 15 U.S.C. § 45, and paragraph 8 of the Consent Order Agreement, the Commission's determination exposes plaintiff to the immediate and continuing threat of substantial civil penalties.

18. The Commission's August 1, 1975 letter has a direct and immediate effect on the day-to-day business of plaintiff, which advertises continually and extensively to promote the sale of its products. Plaintiff would encounter serious difficulties in altering its advertising because the Commission has never specified the corrective measures it considers necessary for compliance with the Order. Even if the Commission had informed plaintiff with sufficient specificity of the changes it believes should be made in plaintiff's advertising, compliance with the Commission's interpretation would require substantial revisions

by plaintiff in millions of dollars worth of advertising and promotional materials.

19. By reason of the general and ordinary deadlines for the submission of advertising copy established by various media, it would be impossible for plaintiff forthwith to revise all of its advertising and promotional materials. As recognized by the provisions of paragraph G of the Order (Exhibit A, at 7), lead times ranging from 45 to 180 days are required with respect to advertising and promotional copy.

20. As a result of the Commission's letter to plaintiff dated August 1, 1975, plaintiff has been put in jeopardy either of having to discontinue at great expense advertising and promotional practices which plaintiff has been advised and believes in good faith to be lawful and in compliance with the requirements of the Order, or alternatively of continuing to utilize such advertising and promotional materials at the risk of incurring enormous and ever higher-mounting civil penalties. This very real dilemma is compounded by the Commission's failure to specify sufficiently the respects in which it believes plaintiff's advertising to be in violation of the Order.

21. Plaintiff has no prompt, adequate and effective remedy at law, and the present action is the only available means for the protection of plaintiff's rights. Unless the Court grants plain-

tiff the relief sought herein, plaintiff will be effectively deprived of its property without due process of law, in violation of the Fifth Amendment to the United States Constitution; plaintiff will be denied the right to effective judicial review of agency action, guaranteed by the Administrative Procedure Act; and plaintiff will otherwise suffer irreparable injury.

WHEREFORE, plaintiff Philip Morris Incorporated respectfully prays this Court:

(i) To issue a judgment declaring that the determinations set forth in the Commission's letter dated August 1, 1975, are inconsistent with the provisions of the Order and are otherwise contrary to law;

(ii) To issue a judgment declaring that plaintiff is not liable for civil penalties;

(iii) To enter an order staying, pending final judgment, the accumulation of penalties under Section 5 of the Act, 15 U.S.C. § 45, for alleged violations of the Order; and

(iv) To grant such other and further relief as the Court may deem just and appropriate.

Respectfully submitted,

ARNOLD & PORTER

By Abe Krash jr

Abe Krash
1229 Nineteenth Street, N. W.
Washington, D C. 20036

CONBOY, HEWITT, O'BRIEN & BOARDMAN

By Donald Fried
Donald Fried
20 Exchange Place
New York, New York 10005

Attorneys for Plaintiff,
Philip Morris Incorporated

Of Counsel:

Melvin Spaeth
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1229 Nineteenth Street, N. W.
Washington, D. C. 20036

Thomas F. Ahrensfeld
Alexander Holtzman
100 Park Avenue
New York, New York 10017

Dated: August 15, 1975

EXHIBIT A--CONSENT ORDER TO CEASE AND DESIST ANNEXED TO VERIFIED COMPLAINT OF PHILIP MORRIS INCORPORATED

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

Commissioners: Miles W. Kirkpatrick, Chairman
Paul Rand Dixon
Everette MacIntyre
Mary Gardiner Jones
David S. Dennison, Jr.

In the Matter of	)	
PHILIP MORRIS INCORPORATED,	)	DOCKET NO. C-2181
a corporation.	)	DECISION AND ORDER.

The Commission having heretofore determined to issue its complaint charging the respondent named in the caption hereof with violation of the Federal Trade Commission Act, and the respondent having been served with notice of said determination and with a copy of the complaint the Commission intended to issue, together with a proposed form of order; and

The respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the complaint to issue herein, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having considered the agreement and having accepted same, and the agreement containing consent order having thereupon been placed on the public record for a period of thirty (30) days, and having duly considered the comments filed thereafter pursuant to Section 2.34(b) of its Rules, now in further conformity with the procedure prescribed in §2.34(b) of its Rules, the Commission hereby issues its complaint in the form contemplated by said agreement, makes the following jurisdictional findings, and enters the following order:

Exhibit A Annexed to Verified Complaint of Philip Morris Incorporated

1. Respondent Philip Morris Incorporated, is a corporation organized existing and doing business under and by virtue of the laws of the State of Virginia, with its principal office and place of business located at 100 Park Avenue, in the City of New York, State of New York.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

I.

IT IS ORDERED that respondent Philip Morris Incorporated, a corporation, its successors and assigns and respondent's officers, agents, representatives and employees directly or through any corporation, subsidiary, division or other device, in connection with the offering for sale, sale or distribution of cigarettes in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from advertising any such cigarette unless respondent makes in all advertisements of such cigarette a clear and conspicuous disclosure of the statement prescribed in Section 4 of the Public Health Cigarette Smoking Act of 1969 (Public Law 91-222) which reads:

"Warning: The Surgeon General Has Determined That Cigarette Smoking Is Dangerous to Your Health."

A. For the purposes of this Order, the term "cigarette" shall mean (A) any roll of tobacco wrapped in paper or in any substance not containing tobacco, and (B) any roll of tobacco wrapped in any substance containing tobacco which, because of its appearance, the type of tobacco used in the filler, or its packaging and labeling, is likely to be offered to, or purchased by, consumers as a cigarette described in subparagraph (A).

B. For the purposes of this Order, the term "advertisement" shall mean all advertising in newspapers, magazines, and other periodicals published and distributed in the United States and other periodicals distributed primarily to members or units of the Armed Forces of the United States located abroad, and advertisements appearing on billboards placed or located within the United States and in other materials as specified in Sections D, E, and F.

C. For the purposes of this Order, the term "clear and conspicuous disclosure" shall mean that

1. The language of the warning statement shall be precisely as prescribed by Congress in Section 4 of the Public Health Cigarette Smoking Act of 1969.

2. The warning statement shall be set in two horizontal lines parallel with the base of the advertisement, separated by leading equivalent to the lower case "x-height", excluding the ascending and descending letters, of the particular type size. In any case where the width of an advertisement in any printed medium is too narrow because of the columnar format, the warning statement may appear in three lines provided there is full compliance with all other requirements in this definition.

3. The warning statement in newspaper, magazine, and other periodical advertisements shall appear in Univers 47 (Fdy) type style. The type size to be employed shall be the following:

10-point type.....in newspaper, magazine, and other periodical advertisements of a trim size not larger than 65 square inches.

12-point type.....in newspaper, magazine, and other periodical advertisements of a trim size larger than 65 square inches but not larger than 110 square inches.

14-point type.....in newspaper, magazine, and other periodical advertisements of a trim size larger than 110 square inches but not larger than 180 square inches.

16-point type.....in newspaper, magazine, and other periodical advertisements of a trim size larger than 180 square inches.

A double full-page or a multiple full-page advertisement in any non-tabloid newspaper shall contain a separate warning statement in 16-point type on each page. A double full-page or multiple full-page advertisement in any tabloid newspaper, magazine or other periodical shall not be required to contain more than one warning statement but the type size requirement shall be determined by the total aggregated size of the entire advertisement.

An advertisement which occupies one full page and part of another page in any newspaper, magazine or other periodical shall not be required to contain more than one warning statement, but the type size requirement shall be determined by the total aggregated size of the entire advertisement, and the warning statement shall appear on the full page on which the advertisement appears. An advertisement which occupies part of each of two or more pages in any newspaper, magazine or other periodical shall not be required to contain more than one warning statement, but the type size requirement shall be determined by the total aggregated size of the entire advertisement, and the warning statement shall appear on that page which contains the greater (or greatest) part of the advertisement.

4. Every warning statement shall be set in a ruled rectangle. The size of the rectangle shall be determined by providing at both ends and at both top and bottom a space between the type block and the enclosing rule not less than the following spaces: where 10-point type is used in the warning statement, the rule shall be 8-points away from the type block; where 12-point type is used in the warning statement, the rule shall be 10-points away from the type block; where 14-point type is used in the warning statement, the rule shall be 12-points away from the type block; and where 16-point type is used in the warning statement, the rule shall be 14-points away from the type block. The width of the rule enclosing the rectangle shall be 1/4-point where 10-point type is used in the warning statement; 1/2-point where 12-point type is used in the warning statement; 3/4-point where 14-point type is used in the warning statement; and 1-point where 16-point type is used in the warning statement.

5. The warning statement shall be printed in black against a solid white background within the rectangle, and the enclosing rule shall be printed in black.

6. The warning statement in its rectangle in any newspaper, magazine, or other periodical advertisement shall be a separate element in each advertisement and shall not contain or include any part of any picture, design, illustration or text within the advertisement. The warning statement in its rectangle shall not be contained or included as an integral part of any specific pictorial design or illustration; in particular, it shall not be made a constituent part of a reproduction of the package of cigarettes. The warning statement in its rectangle may be printed or superimposed upon any pictorial background portion of any advertisement.

7. The warning statement in its rectangle in any newspaper, magazine, or other periodical advertisement may be positioned anywhere within the trim area of the advertisement, but shall not be positioned in the margin of any advertisement. The rectangle shall not be positioned immediately next to, or immediately contiguous to, any rectangular designs, elements, or similar geometric forms (other than a picture of the cigarette package) or immediately contiguous to any textual matter appearing in the advertisement.

8. Blurring or illegibility of the warning statement in its rectangle occurring for reasons beyond the control of the respondent shall not be in violation of this Order.

D. On billboards of a size 24-sheets and larger, the type size of the warning statement shall be not less than 2 inches in height, and the rectangle and the enclosing rule shall be of a size, shape, contrast, and placement, proportionately corresponding to those specified in Subsections C-1, -2, -4, -5, -6, and -7 for newspaper, magazine, and other periodical advertisements of a trim size larger than 180 square inches. On billboards of a size 6-, 7-, and 8-sheets the type size shall be not less than 3/4 inches, on those of a size 2- through 5-sheets the type size shall be not less than 1/2 inch, and the rectangle and the enclosing rule shall be of a size, shape, contrast and placement, proportionately corresponding to those specified in Subsections C-1, -2, -4, -5, -6, and -7 for newspaper, magazine, and other periodical advertisements of a trim size larger than 180 square inches. On 1-sheet billboards the type size shall be not less than 24-points, and the rectangle and the enclosing rule shall be of a size, shape, contrast and placement, proportionately corresponding to those specified in Subsections C-1, -2, -4, -5, -6 and -7 for newspaper, magazine, and other periodical advertisements of a trim size larger than 180 square inches. On all public transit side cards of any shape the type size shall be not less than 18-points, and the rectangle and the enclosing rule shall be of a size, shape, contrast and placement, proportionately corresponding to those specified in Subsections C-1, -2, -4, -5, -6, and -7 for newspaper, magazine, and other periodical advertisements of a trim size larger than 180 square inches. All public transit end cards shall comply with the minimum requirements for 1-sheet billboards. The type style on any billboard or transit card shall be Univers 47 (Fdy) or a similar font.

E. On all point-of-sale promotional materials exhibited to cigarette purchasers, which have a surface containing an advertising display area of more than 36 square inches, the warning statement within its rectangle shall be included in a type size proportional to the type size specified in the nearest page size category for newspaper, magazine, and other periodical advertisements, as specified in Subsections C-1, -2, -3, -4, -5, -6, and -7. In determining the size of the advertising display area in point-of-sale promotional materials consisting of two or more pages, the total advertising display area of each page on which any printed or graphic material appears shall be aggregated, and where the aggregate of the advertising display area, on which any printed or graphic material appears, exceeds 36 square inches, the warning statement within its rectangle shall be placed on one of those pages and proportionalized to the size of that page in accordance with Section C. The warning statement shall not be required on any non-media advertising and promotional materials offered or given to consumers; nor shall the warning statement be required on any promotional materials which are not for public display or public consumer exposure, and are distributed to cigarette wholesalers, dealers, and merchants.

F. All advertising contained in non-point-of-sale leaflets, direct-mail circulars, paperback book inserts, and programs shall contain the warning statement within its rectangle in a type size proportional to the type size specified in the nearest page size category for newspaper, magazine, and other periodical advertisements, as specified in Subsections C-1, -2, -3, -4, -5, -6, and -7.

G. Sections C, D, E, and F of this Order shall become effective sixty (60) days after it is finally issued, but to meet the general and ordinary deadlines for submission of advertising copy established by the medium by or in which the advertisement is to appear, the requirements of Sections C, D, E, and F shall not be applicable (a) to newspaper, magazine, or other periodical advertising for which the closing date on which an advertiser must, according to the regular schedule of that newspaper, magazine, or other periodical, deliver the advertising material in final form to the printer, to the publisher, or as to spectacolor-type, to the production house, is less than forty-five (45) days after the date on which this Order shall become effective; (b) to advertising appearing on billboards for which copy must, according to the earliest practical date for replacement, be delivered in final form to the printer or painted or assembled on such billboards less than forty-five (45) days after the date on which this Order shall become effective, but in any event, as to advertising appearing on billboards Sections C, D, E, and F

shall become applicable one hundred eighty (180) days from the date this Order shall become effective; (c) to advertising printed on non-point-of-sale leaflets, direct-mail circulars, paperback book inserts, and programs which is delivered in final form to the printer less than forty-five (45) days after the date on which this Order shall become effective, but in any event, as to advertising printed on non-point-of-sale leaflets, direct-mail circulars, paperback book inserts, and programs, Sections C, D, E, and F shall become applicable one hundred forty (140) days from the date this Order shall become effective; or (d) to point-of-sale promotional materials exhibited to cigarette purchasers, which have a surface containing an advertising display area of more than 36 square inches, delivered in final form to the printer less than forty-five (45) days from the date this Order shall become effective.

H. This Order shall not be applicable to signs on factories, plants, warehouses, and other facilities related to the manufacture or factory storage of cigarettes, to corporate or financial reports, or to employment advertising, or to advertising in tobacco trade publications not circulated to consumers.

II.

IT IS FURTHER ORDERED that the respondent corporation shall forthwith distribute a copy of this order to each of its operating divisions or departments.

IT IS FURTHER ORDERED that respondent notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order.

IT IS FURTHER ORDERED that respondent shall, within sixty (60) days after service upon it of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with the order to cease and desist.

By the Commission; Commissioner Jones' statement is attached.

S E A L

Chas. A. Tobin,
Secretary.

ISSUED: March 30, 1972

Exhibit A Annexed to Verified Complaint of Philip Morris Incorporated

Statement of Commissioner Jones

I dissent to the Commission's acceptance of these consent agreements because of their provisions respecting the clear and conspicuous disclosure requirements of the Warning. The Commission had no proper empirical or clinical basis on which to support the instant order provisions and hence had no reason to believe that the required disclosures would in fact be clear and conspicuous to the casual readers of the magazines in which these advertisements are intended to appear.

EXHIBIT B--COMMISSION'S LETTER AUGUST 1, 1975 ANNEXED TO VERIFIED COMPLAINT OF PHILIP MORRIS INCORPORATED

FEDERAL TRADE COMMISSION
WASHINGTON, D. C. 20580

AUG 1 1975

OFFICE OF THE SECRETARY

Philip Morris Incorporated
100 Park Avenue
New York, New York 10017

Attention: Alexander Holtzman, Esquire
Associate General Counsel

Re: Philip Morris Incorporated
Docket No. C-2181

Dear Mr. Holtzman:

The Federal Trade Commission has determined that Philip Morris Incorporated has violated the above-captioned order by failing in certain cigarette advertisements to disclose the required health warning and by failing in other cigarette advertisements to disclose the health warning in the clear and conspicuous manner that is required by the order.

The Commission will, therefore, pursuant to the provisions of 15 U.S.C. 56(a)(1), notify the Attorney General of its intention to commence for these violations an action for civil penalties and other relief. For certain other violations of the order, the Commission will hold a civil penalty action in abeyance for 180 days. If, however, at the expiration of that period, Philip Morris Incorporated has not corrected these other violations, the Commission will seek civil penalties and other relief for them as well.

The Commission will immediately notify the Department of Justice of its intention to file a complaint for the following violations of the order:

1) The advertisement of cigarettes on display panels inserted since July 1972 into vending machines which fail to disclose the required health warning in violation of Section I-E of the order.

2) The advertisement of cigarettes on other promotional materials exhibited to the public since July, 1972, such as counter racks and aisle markers which fail to disclose the health warning or which disclose the health warning in a type size smaller than that required for the entire advertising display area in violation of Section I-E or I-F of the order.

3) The advertisement of cigarettes in newspapers, magazines or other periodicals published and distributed in the United States since July, 1972, which violate Section I-C of the order

a) by failing to disclose any health warning, as was the case with the advertisements "Marlboro. Now the Number One Selling Cigarette," More, March 1975, and "Come to Where the Flavor Is," Pan Am Clipper, December 1974; or

b) by appearing to the public with a disclosure of the health warning in a type style or type size smaller than that required for the advertisement's trim size; or

c) by positioning the warning rectangle not within the trim area of the advertisement; or

d) by positioning the warning rectangle immediately next to, or immediately contiguous to, other rectangular designs, elements or similar geometric forms, as was the case with the advertisement, the "Benson and Hedges 100's Sweepstakes".

4) Foreign language cigarette advertisements published and distributed, or otherwise exhibited to the public, since November 13, 1973, which violate the order by disclosing the health warning in a language different from that principally used by the advertisement or in an inaccurate translation of the statement prescribed by Congress in Section 4 of the Public Health Cigarette Smoking Act of 1969.

The Commission has also determined that Philip Morris Incorporated has failed to disclose the health warning on billboard and transit card advertisements clearly and conspicuously as required by the order. Section I-D of the order specifies minimum type sizes for different sizes of billboards and transit cards. Compliance with that provision, however, does not satisfy the overriding requirement established by the order that in these media the disclosure must be clear and conspicuous. Disclosures which conform to the minimum size provisions of Section I-D but which nonetheless are not of sufficient size for the warning to be read by those who view the advertisement cannot be deemed to comply with the order.

Moreover, the Commission has also determined that the typographic composition of the health warning utilized by your company violates Sections I-C-2 and I-C-4 of the order by measuring the requisite leading and spacing distances from the type faces and not from the type shoulders.

The Commission will not, however, immediately initiate a civil penalty action regarding violations pertaining to the size of the warning on billboards and transit cards or pertaining to the typographic requirements for the leading and spacing of the warning if those violations are remedied within 180 days from receipt of this order.

Exhibit B Annexed to Verified Complaint of Philip Morris Incorporated

The Commission received and carefully considered your company's Statement of Position prior to making its determination in this matter.

By direction of the Commission.

Chas. A. Tobin

Charles A. Tobin
Secretary

cc: H. Thomas Austern, Esquire
c/o Covington & Burling
888 - 16th Street, N. W.
Washington, D. C. 20006

Horace R. Kornegay, Esquire
c/o The Tobacco Institute, Inc.
1776 K Street, N. W.
Washington, D. C. 20006

VERIFIED COMPLAINT OF R. J. REYNOLDS TOBACCO COMPANY

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

R. J. REYNOLDS TOBACCO COMPANY 401 N. Main Street Winston Salem, N.C., a New Jersey corporation, Plaintiff, -v- LEWIS A. ENGMAN, Chairman, Federal Trade Commission; PAUL RAND DIXON, MAYO J. THOMPSON, M. ELIZABETH HANFORD, and STEPHEN NYE, Members, Federal Trade Commission; FEDERAL TRADE COMMISSION; EDWARD H. LEVI, Attorney General of the United States; and UNITED STATES OF AMERICA, Defendants.	75 Civ. 4049 (KTD) VERIFIED COMPLAINT FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF

Plaintiff, R. J. Reynolds Tobacco Company (Reynolds), for its Complaint herein, alleges as follows:

Parties, Jurisdiction and Venue

1. This is an action for a declaratory judgment that certain acts done and threatened to be done by the defendants in their official capacity are unauthorized by and contrary to law, and for injunctive and certain other relief.

2. This action arises under the Fifth Amendment to the Constitution of the United States, the Federal Trade Commission Act (the "Act"), 38 Stat. 717 (1914), as amended, 15 U.S.C. §§ 41 et seq., [and the Administrative Procedure

Act, 5 U.S.C. §§ 551 et seq.]. This Court has jurisdiction pursuant to the provisions of 28 U.S.C. § 1331, 28 U.S.C. § 1337, 28 U.S.C. §§ 2201-02, [and 5 U.S.C. §§ 702-06]. There exists between the parties an actual controversy, justiciable in character, in respect of which plaintiff requires a declaration of its rights by this Court. The matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs.

3. Plaintiff Reynolds is a corporation incorporated under the laws of the State of New Jersey. Plaintiff's principal offices are located in Winston Salem, North Carolina, at 401 N. Main Street. Plaintiff is engaged in the production, sale and distribution of cigarettes and other tobacco products.

4. The defendant LEWIS A. ENGMAN is the chairman of the Federal Trade Commission (the "Commission"). The defendants PAUL RAND DIXON, MAYO J. THOMPSON, M. ELIZABETH HANFORD, and STEPHEN NYE are members of the Federal Trade Commission. The defendant FEDERAL TRADE COMMISSION was created and established by an Act of Congress known as the Federal Trade Commission Act, 15 U.S.C. § 41 et seq. The defendant EDWARD H. LEVI is the Attomey General of the United States, who is authorized by § 16(a)(1) of the Act, 15 U.S.C. § 56(a)(1), to institute suit against plaintiff in the name of defendant UNITED STATES OF AMERICA. All individual defendants are sued in their official capacities.

5. The controversy between the parties arises over certain of plaintiff's advertisements and promotional material for cigarettes, substantial portions of which were prepared or placed by plaintiff in this judicial district,

and which were published and disseminated in this district. Venue is properly laid in this district by virtue of 28 U.S.C. § 1391(e)(2).

Statement of the Claim

6. On or about May 1, 1971, the Commission served on plaintiff and five other cigarette manufacturers identical proposed complaints which charged that the non-disclosure by respondents in their advertising of the health warning required to be placed on cigarette packages by § 4 of the Public Health Cigarette Smoking Act of 1969, 15 U.S.C. §1333, was a deceptive practice prohibited by § 5 of the Federal Trade Commission Act, 15 U.S.C. § 45. The six respondents, including plaintiff, were offered a six-month period within which to negotiate settlements of the proposed complaints.

7. Thereafter plaintiff and five other respondents jointly commenced intensive negotiations with the Commission which covered, inter alia, the format, type size, type style, and other minute details of the warning statement to be included in newspaper, magazine and billboard advertising, transit cards, and paperback book inserts and the manner and extent to which the warning statement was to be depicted in point-of-sale ("POS") promotional material.

As negotiating discussions progressed, they were closely monitored by the five then-Commissioners, who, on a number of occasions, reviewed "mock-up" advertisements illustrating different specific presentations of the warning statement and approved or rejected the tentative approaches proposed by the Staff and Industry. The Commissioners reviewed and approved a warning

statement format for print advertising whose specifications matched the specifications of the warning statement which the respondents have employed since 1972. The negotiations, which extended over many months, culminated in six consent agreements and orders, identical as to each respondent, formally issued by the Commission on March 30, 1972 (the "Consent Orders"). A copy of the Consent Order applicable to plaintiff is attached hereto as Exhibit A.

8. At all relevant times, plaintiff has diligently fulfilled its obligations under the Consent Order. Plaintiff has established detailed procedures to insure that advertising and promotional material subject to the Consent Order contain a warning statement conforming to the requirements of the Order.

9. Since the Order become effective, the warning statement has appeared in conformity with the Order in thousands of newspaper advertisements, POS pieces, billboards, and other advertising and promotional material which plaintiff produced.

10. In August and September 1972, plaintiff and the five other companies submitted compliance reports to the Commission as required by the Consent Orders. Plaintiff's report of its compliance with the requirements of the Consent Order included copies of current and representative advertisements and promotional material with the warning statement printed in conformity with the terms of the Consent Order. In December 1972, the Commission advised plaintiff that "on the assumption that the information submitted [in the compliance report] is accurate and complete,... no compliance action by the Commission is indicated at this time."

11. Based upon its examination of the compliance reports and other widely disseminated cigarette advertising available to it, on December 31, 1972, the Commission publicly and officially reported to Congress, pursuant to 15 U.S.C. § 1337, that:

> "Advertisements containing the disclosure statement in the format required by these orders began to appear in May of 1972, and by the end of October, all cigarette advertisements observed by the Commission staff were being published in accordance with the terms of these orders." (Federal Trade Commission Report to Congress, December 31, 1972, p. 4.)

12. On December 31, 1973, in its next annual Report to Congress, the Commission publicly and officially repeated that "by October of 1972, almost all cigarette advertising published in this country was in compliance with the terms" of the Consent Orders. (Federal Trade Commission Report to Congress, December 31, 1973, p. 1.)

13. Plaintiff, relying in good faith on the Commission's approval of its compliance report and on the Commission's official reports to Congress, believed that the Commission had accepted the manner in which plaintiff depicted the warning statement in its advertising as fully conforming to the requirements of the Order and prepared and placed its advertisements in accordance with that reliance.

14. By letter dated March 25, 1974, the Commission's staff notified plaintiff that "The Complaince Division is instituting an inquiry into the manner of [plaintiff's] compliance" with certain provisions of the Order and included, in its letter, a reference to the Commission's July 24, 1973,

Enforcement Policy Statement relating to certain disclosures in foreign language advertising. Although the Enforcement Policy Statement could not modify the requirements of the Order, plaintiff advised the staff representative on March 28, 1974, that "R. J. Reynolds Tobacco Company has taken steps to comply with the Commission's July 24, 1973, Enforcement Policy Statement."

15. By letter dated April 22, 1974, the Commission's staff again informed plaintiff that an inquiry was being instituted into the manner of plaintiff's compliance with those provisions of the Order identified in the March 25, 1974, letter. Throughout the investigation which ensued, the Commission's staff was given plaintiff's full cooperation. In response to plaintiff's repeated requests that there should be discussions as to what would avoid future controversy regarding plaintiff's advertising and promotional materials, the staff repeatedly informed plaintiff's counsel that, as a pre-condition to such discussions, plaintiff would have to agree to join with the other five companies in a lump sum payment of about six million dollars as penalties for alleged past violations of the Orders. Plaintiff would not and could not accept this demand because plaintiff had not violated the Order and the staff's demand gave no assurance that future controversy would be avoided.

16. By letters to plaintiff dated August 1, 1975, the Commission stated that it "has determined" that plaintiff has violated" the Order in various respects. The letter stated that the Commission had determined to commence "an action for civil penalties and other relief" with respect to certain alleged violations of the Order. With respect to other alleged violations, the

Commission stated that it would "hold a civil penalty action in abeyance for 180 days," but if at the expiration of such period plaintiff had not "corrected" these violations in accordance with the Commission's demands, "civil penalties and other relief" would be sought by the Commission for such alleged violations. A copy of the Commission's letter to plaintiff is attached hereto as Exhibit B.

17. The determinations in the Commission's letter that plaintiff violated the Order are largely vague and ambiguous and to the extent they can be understood are based on erroneous and unwarranted interpretations of the express terms of the Order. These determinations repudiate the Commission's reports to Congress that plaintiff's advertising was in compliance with the Order, disregard plaintiff's good faith reliance on the Commission's public statements with respect to plaintiff's advertising and promotion, and are inconsistent with the Commission's earlier acceptance of plaintiff's compliance report.

18. By reason of the provisions of Section 5 of the Act, 15 U.S.C. § 45, and paragraph 8 of the Order, the Commission's determination exposes plaintiff to the immediate and continuing threat of substantial civil penalties.

19. The Commission's August 1, 1975, letter has a direct and immediate effect on the day-to-day business of plaintiff, which advertises continually and extensively to promote the sale of its products. Plaintiff would encounter serious difficulties in altering its advertising because the Commission has never specified the corrective measures it considers necessary for compliance with the Consent Order. Even if the Commission had informed

plaintiff with sufficient specificity of the changes it believes should be made in plaintiff's advertising, compliance with the Commission's interpretation would require substantial revisions by plaintiff in millions of dollars worth of advertising and promotional materials.

20. By reason of the general and ordinary deadlines for the submission of advertising copy established by various media, it would be impossible for plaintiff forthwith to revise all of its advertising and promotional materials. As recognized by the provisions of paragraph G of the Order (Exhibit A, at 7), lead times ranging from 45 to 180 days are required with respect to advertising and promotional copy.

21. As a result of the Commission's letter to plaintiff dated August 1, 1975, plaintiff has been put in jeopardy either of having to discontinue at great expense advertising and promotional practices which plaintiff has been advised and believes in good faith to be lawful and in compliance with the requirements of the Order, or alternatively of continuing to utilize such advertising and promotional materials at the risk of incurring enormous and ever higher-mounting civil penalties. This very real dilemma is compounded by the Commission's failure to specify sufficiently the respects in which it believes plaintiff's advertising to be in violation of the Order.

22. Plaintiff has no prompt, adequate and effective remedy at law, and the present action is the only available means for the protection of plaintiff's rights. Unless the Court grants plaintiff the relief sought herein, plaintiff will be effectively deprived of its property without due process of law, in violation

of the Fifth Amendment to the United States Constitution; plaintiff will be denied the right to effective judicial review of agency action, guaranteed by the Administrative Procedure Act; and plaintiff will otherwise suffer irreparable injury.

WHEREFORE, plaintiff Reynolds respectfully prays this Court:

(i) To issue a judgment declaring that the determinations set forth in the Commission's letter dated August 1, 1975, are inconsistent with the provisions of the Order and are otherwise contrary to law;

(ii) To issue a judgment declaring that plaintiff is not liable for civil penalties;

(iii) To enter an order staying, pending final judgment, the accumulation of penalties under Section 5 of the Act, 15 U.S.C. § 45, for alleged violations of the Order; and

(iv) To grant such other and further relief as the Court may deem just and appropriate.

Respectfully submitted,

Davis, Polk & Wardwell
One Chase Manhattan Plaza
New York, New York 10005

By /S/ C. Crowley
A member of the firm

Of Counsel:

Clifford, Warnke, Glass, McIlwain & Finney
815 Connecticut Avenue
Washington, D. C. 20006

Paul C. Warnke, Esquire
John F. Kovin, Esquire

H. C. Roemer, Esquire
Max H. Crohn, Jr., Esquire

401 North Main Street
Winston-Salem, North Carolina 27102

(Verified)

EXHIBIT A--CONSENT ORDER TO CEASE AND DESIST
ANNEXED TO VERIFIED COMPLAINT OF
R. J. REYNOLDS TOBACCO COMPANY

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

Commissioners: Miles W. Kirkpatrick, Chairman
Paul Rand Dixon
Everette MacIntyre
Mary Gardiner Jones
David S. Dennison, Jr.

In the Matter of	
R.J. REYNOLDS TOBACCO COMPANY,	DOCKET NO. C-2184
a corporation.	DECISION AND ORDER.

The Commission having heretofore determined to issue its complaint charging the respondent named in the caption hereof with violation of the Federal Trade Commission Act, and the respondent having been served with notice of said determination and with a copy of the complaint the Commission intended to issue, together with a proposed form of order; and

The respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the complaint to issue herein, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having considered the agreement and having accepted same, and the agreement containing consent order having thereupon been placed on the public record for a period of thirty (30) days, and having duly considered the comments filed thereafter pursuant to Section 2.34(b) of its Rules, now in further conformity with the procedure prescribed in §2.34(b) of its Rules, the Commission hereby issues its complaint in the form contemplated by said agreement, makes the following jurisdictional findings, and enters the following order:

Exhibit A Annexed to Verified Complaint of R. J. Reynolds Tobacco Company

1. Respondent R.J. Reynolds Tobacco Company, is a corporation organized existing and doing business under and by virtue of the laws of the State of New Jersey, with its principal office and place of business located at 401 North Main Street, in the City of Winston-Salem, State of North Carolina.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

I.

IT IS ORDERED that respondent R.J. Reynolds Tobacco Company, a corporation, its successors and assigns and respondent's officers, agents, representatives and employees directly or through any corporation, subsidiary, division or other device, in connection with the offering for sale, sale or distribution of cigarettes in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from advertising any such cigarette unless respondent makes in all advertisements of such cigarette a clear and conspicuous disclosure of the statement prescribed in Section 4 of the Public Health Cigarette Smoking Act of 1969 (Public Law 91-222) which reads:

"Warning: The Surgeon General Has Determined That Cigarette Smoking Is Dangerous to Your Health."

A. For the purposes of this Order, the term "cigarette" shall mean (A) any roll of tobacco wrapped in paper or in any substance not containing tobacco, and (B) any roll of tobacco wrapped in any substance containing tobacco which, because of its appearance, the type of tobacco used in the filler, or its packaging and labeling, is likely to be offered to, or purchased by, consumers as a cigarette described in subparagraph (A).

B. For the purposes of this Order, the term "advertisement" shall mean all advertising in newspapers, magazines, and other periodicals published and distributed in the United States and other periodicals distributed primarily to members or units of the Armed Forces of the United States located abroad, and advertisements appearing on billboards placed or located within the United States and in other materials as specified in Sections D, E, and F.

C. For the purposes of this Order, the term "clear and conspicuous disclosure" shall mean that

1. The language of the warning statement shall be precisely as prescribed by Congress in Section 4 of the Public Health Cigarette Smoking Act of 1969.

2. The warning statement shall be set in two horizontal lines parallel with the base of the advertisement, separated by leading equivalent to the lower case "x-height", excluding the ascending and descending letters, of the particular type size. In any case where the width of an advertisement in any printed medium is too narrow because of the columnar format, the warning statement may appear in three lines provided there is full compliance with all other requirements in this definition.

3. The warning statement in newspaper, magazine, and other periodical advertisements shall appear in Univers 47 (Fdy) type style. The type size to be employed shall be the following:

10-point type.....in newspaper, magazine, and other periodical advertisements of a trim size not larger than 65 square inches.

12-point type.....in newspaper, magazine, and other periodical advertisements of a trim size larger than 65 square inches but not larger than 110 square inches.

14-point type.....in newspaper, magazine, and other periodical advertisements of a trim size larger than 110 square inches but not larger than 180 square inches.

16-point type.....in newspaper, magazine, and other periodical advertisements of a trim size larger than 180 square inches.

A double full-page or a multiple full-page advertisement in any non-tabloid newspaper shall contain a separate warning statement in 16-point type on each page. A double full-page or multiple full-page advertisement in any tabloid newspaper, magazine or other periodical shall not be required to contain more than one warning statement but the type size requirement shall be determined by the total aggregated size of the entire advertisement.

An advertisement which occupies one full page and part of another page in any newspaper, magazine or other periodical shall not be required to contain more than one warning statement, but the type size requirement shall be determined by the total aggregated size of the entire advertisement, and the warning statement shall appear on the full page on which the advertisement appears. An advertisement which occupies part of each of two or more pages in any newspaper, magazine or other periodical shall not be required to contain more than one warning statement, but the type size requirement shall be determined by the total aggregated size of the entire advertisement, and the warning statement shall appear on that page which contains the greater (or greatest) part of the advertisement.

4. Every warning statement shall be set in a ruled rectangle. The size of the rectangle shall be determined by providing at both ends and at both top and bottom a space between the type block and the enclosing rule not less than the following spaces: where 10-point type is used in the warning statement, the rule shall be 8-points away from the type block; where 12-point type is used in the warning statement, the rule shall be 10-points away from the type block; where 14-point type is used in the warning statement, the rule shall be 12-points away from the type block; and where 16-point type is used in the warning statement, the rule shall be 14-points away from the type block. The width of the rule enclosing the rectangle shall be 1/4-point where 10-point type is used in the warning statement; 1/2-point where 12-point type is used in the warning statement; 3/4-point where 14-point type is used in the warning statement; and 1-point where 16-point type is used in the warning statement.

5. The warning statement shall be printed in black against a solid white background within the rectangle, and the enclosing rule shall be printed in black.

6. The warning statement in its rectangle in any newspaper, magazine, or other periodical advertisement shall be a separate element in each advertisement and shall not contain or include any part of any picture, design, illustration or text within the advertisement. The warning statement in its rectangle shall not be contained or included as an integral part of any specific pictorial design or illustration; in particular, it shall not be made a constituent part of a reproduction of the package of cigarettes. The warning statement in its rectangle may be printed or superimposed upon any pictorial background portion of any advertisement.

7. The warning statement in its rectangle in any newspaper, magazine, or other periodical advertisement may be positioned anywhere within the trim area of the advertisement, but shall not be positioned in the margin of any advertisement. The rectangle shall not be positioned immediately next to, or immediately contiguous to, any rectangular designs, ellipses, or similar geometric forms (other than a picture of the cigarette package) or immediately contiguous to any textual matter appearing in the advertisement.

8. Blurring or illegibility of the warning statement in its rectangle occurring for reasons beyond the control of the respondent shall not be in violation of this Order.

D. On billboards of a size 24-sheets and larger, the type size of the warning statement shall be not less than 2 inches in height, and the rectangle and the enclosing rule shall be of a size, shape, contrast, and placement, proportionately corresponding to those specified in Subsections C-1, -2, -4, -5, -6, and -7 for newspaper, magazine, and other periodical advertisements of a trim size larger than 180 square inches. On billboards of a size 6-, 7-, and 8-sheets the type size shall be not less than 3/4 inches, on those of a size 2- through 5-sheets the type size shall be not less than 1/2 inch, and the rectangle and the enclosing rule shall be of a size, shape, contrast and placement, proportionately corresponding to those specified in Subsections C-1, -2, -4, -5, -6, and -7 for newspaper, magazine, and other periodical advertisements of a trim size larger than 180 square inches. On 1-sheet billboards the type size shall be not less than 24-points, and the rectangle and the enclosing rule shall be of a size, shape, contrast and placement, proportionately corresponding to those specified in Subsections C-1, -2, -4, -5, -6 and -7 for newspaper, magazine, and other periodical advertisements of a trim size larger than 180 square inches. On all public transit side cards of any shape the type size shall be not less than 18-points, and the rectangle and the enclosing rule shall be of a size, shape, contrast and placement, proportionately corresponding to those specified in Subsections C-1, -2, -4, -5, -6, and -7 for newspaper, magazine, and other periodical advertisements of a trim size larger than 180 square inches. All public transit end cards shall comply with the minimum requirements for 1-sheet billboards. The type style on any billboard or transit card shall be Univers 47 (Fdy) or a similar font.

E. On all point-of-sale promotional materials exhibited to cigarette purchasers, which have a surface containing an advertising display area of more than 36 square inches, the warning statement within its rectangle shall be included in a type size proportional to the type size specified in the nearest page size category for newspaper, magazine, and other periodical advertisements, as specified in Subsections C-1, -2, -3, -4, -5, -6, and -7. In determining the size of the advertising display area in point-of-sale promotional materials consisting of two or more pages, the total advertising display area of each page on which any printed or graphic material appears shall be aggregated, and where the aggregate of the advertising display area, on which any printed or graphic material appears, exceeds 36 square inches, the warning statement within its rectangle shall be placed on one of those pages and proportionalized to the size of that page in accordance with Section C. The warning statement shall not be required on any non-media advertising and promotional materials offered or given to consumers; nor shall the warning statement be required on any promotional materials which are not for public display or public consumer exposure, and are distributed to cigarette wholesalers, dealers, and merchants.

F. All advertising contained in non-point-of-sale leaflets, direct-mail circulars, paperback book inserts, and programs shall contain the warning statement within its rectangle in a type size proportional to the type size specified in the nearest page size category for newspaper, magazine, and other periodical advertisements, as specified in Subsections C-1, -2, -3, -4, -5, -6, and -7.

G. Sections C, D, E, and F of this Order shall become effective sixty (60) days after it is finally issued, but to meet the general and ordinary deadlines for submission of advertising copy established by the medium by or in which the advertisement is to appear, the requirements of Sections C, D, E, and F shall not be applicable (a) to newspaper, magazine, or other periodical advertising for which the closing date on which an advertiser must, according to the regular schedule of that newspaper, magazine, or other periodical, deliver the advertising material in final form to the printer, to the publisher, or as to spectacolor-type, to the production house, is less than forty-five (45) days after the date on which this Order shall become effective; (b) to advertising appearing on billboards for which copy must, according to the earliest practical date for replacement, be delivered in final form to the printer or painted or assembled on such billboards less than forty-five (45) days after the date on which this Order shall become effective, but in any event, as to advertising appearing on billboards Sections C, D, E, and F

shall become applicable one hundred eighty (180) days from the date this Order shall become effective; (c) to advertising printed on non-point-of-sale leaflets, direct-mail circulars, paperback book inserts, and programs which is delivered in final form to the printer less than forty-five (45) days after the date on which this Order shall become effective, but in any event, as to advertising printed on non-point-of-sale leaflets, direct-mail circulars, paperback book inserts, and programs, Sections C, D, E, and F shall become applicable one hundred forty (140) days from the date this Order shall become effective; or (d) to point-of-sale promotional materials exhibited to cigarette purchasers, which have a surface containing an advertising display area of more than 36 square inches, delivered in final form to the printer less than forty-five (45) days from the date this Order shall become effective.

H. This Order shall not be applicable to signs on factories, plants, warehouses, and other facilities related to the manufacture or factory storage of cigarettes, to corporate or financial reports, or to employment advertising, or to advertising in tobacco trade publications not circulated to consumers.

II.

IT IS FURTHER ORDERED that the respondent corporation shall forthwith distribute a copy of this order to each of its operating divisions or departments.

IT IS FURTHER ORDERED that respondent notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order.

IT IS FURTHER ORDERED that respondent shall, within sixty (60) days after service upon it of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with the order to cease and desist.

By the Commission; Commissioner Jones' statement is attached.

Chas. A. Tobin

Charles A. Tobin,
Secretary.

S E A L

ISSUED: March 30, 1972

A 79

EXHIBIT B--COMMISSION'S LETTER AUGUST 1, 1975
ANNEXED TO VERIFIED COMPLAINT OF
R. J. REYNOLDS TOBACCO COMPANY

FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

AUG 1 '75

R. J. Reynolds Tobacco Company, Inc.
R. J. Reynolds Industries, Inc.
Winston-Salem, North Carolina 27102

Attention: Max Crohn, Esquire
Assistant General Counsel

Re: R. J. Reynolds Tobacco Company, Inc.
Docket No. C-2184

Dear Mr. Crohn:

The Federal Trade Commission has determined that R. J. Reynolds Tobacco Company has violated the above-captioned order by failing in certain cigarette advertisements to disclose the required health warning and by failing in other cigarette advertisements to disclose the health warning in the clear and conspicuous manner that is required by the order.

The Commission will, therefore, pursuant to the provisions of 15 U.S.C. 56(a)(1), notify the Attorney General of its intention to commence for these violations an action for civil penalties and other relief. For certain other violations of the order, the Commission will hold a civil penalty action in abeyance for 180 days. If, however, at the expiration of that period, R. J. Reynolds Tobacco Company has not corrected these other violations, the Commission will seek civil penalties and other relief for them as well.

The Commission will immediately notify the Department of Justice of its intention to file a complaint for the following violations of the order:

1) The advertisement of cigarettes on display panels inserted since July 1973 into vending machines which fail to disclose the required health warning in violation of Section I-E of the order.

2) The advertisement of cigarettes on other promotional materials exhibited to the public since July, 1972, such as counter racks, matchbook dispensers, change mats, calendars and store hour signs, which fail to disclose the health warning or which disclose the health warning in a type size smaller than that required for the entire advertising display area, in violation of Section I-E or I-F of the order.

3) The advertisement of cigarettes in newspapers, magazines or other periodicals published and distributed in the United States since July, 1972, which appeared to the public with a disclosure of the health warning in a type style or type size smaller than that required for the advertisement's trim size; or, as for example, the "Camel Dynamite Offer" and "New Winston Lights" advertisements, which positioned the warning rectangle immediately next to, or immediately contiguous to, other rectangular designs, elements or similar geometric forms, in violation of Section I-C of the order.

4) Foreign language cigarette advertisements published and distributed, or otherwise exhibited to the public, since November 13, 1973, which violate the order by disclosing the health warning in a language different from that principally used by the advertisement or in an inaccurate translation of the statement prescribed by Congress in Section 4 of the Public Health Cigarette Smoking Act of 1969.

The Commission has also determined that R. J. Reynolds Tobacco Company has failed to disclose the health warning on billboard and transit card advertisements clearly and conspicuously as required by the order. Section I-D of the order specifies minimum type sizes for different sizes of billboards and transit cards. Compliance with that provision, however, does not satisfy the overriding requirement established by the order that in these media the disclosure must be clear

and conspicuous. Disclosures which conform to the minimum size provisions of Section I-D but which nonetheless are not of sufficient size for the warning to be read by those who view the advertisement cannot be deemed to comply with the order.

Moreover, the Commission has also determined that the typographic composition of the health warning utilized by your company violates Sections I-C-2 and I-C-4 of the order by measuring the requisite leading and spacing distances from the type faces and not from the type shoulders.

The Commission will not, however, immediately initiate civil penalty action regarding violations pertaining to the size of the warning on billboards and transit cards or pertaining to the typographic requirements for the leading and spacing of the warning if those violations are remedied within 130 days from receipt of this order.

The Commission received and carefully considered your company's Statement of Position prior to making its determination in this matter.

By direction of the Commission.

SIGNED AND MAILED

Charles A. Tobin
Secretary

cc: H. Thomas Austern, Esquire
c/o Covington & Burling
888 - 16th Street, N. W.
Washington, D. C. 20006

Horace R. Kornegay, Esquire
c/o The Tobacco Institute, Inc.
1776 K Street, N. W.
Washington, D. C. 20006

VERIFIED COMPLAINT OF LOEW'S THEATRES, INC.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

LOEW'S THEATRES, INC.,

Plaintiff,

-against-

LEWIS A. ENGMAN, Chairman, Federal Trade Commission; PAUL RAND DIXON, MAYO J. THOMPSON, M. ELIZABETH HANFORD, and STEPHEN NYE, Members, Federal Trade Commission; FEDERAL TRADE COMMISSION; EDWARD H. LEVI, Attorney General of the United States; and UNITED STATES OF AMERICA,

Defendants.

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75 Civ. 4050 (CBM)

VERIFIED COMPLAINT FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF

Plaintiff, Loew's Theatres, Inc., for its Complaint herein, alleges as follows:

Parties, Jurisdiction and Venue

1. This is an action for a declaratory judgment that certain acts done and threatened to be done by the defendants in their official capacities are unauthorized by and contrary to law, and for injunctive and certain other relief.

2. This action arises under the Fifth Amendment to the Constitution of the United States, the Federal Trade Commission Act (the "Act"), 38 Stat. 717 (1914), as amended, 15 U.S.C. §§41 et seq., and the Administrative Procedure Act, 5 U.S.C.

§§551 et seq. This Court has jurisdiction pursuant to the provisions of 28 U.S.C. §1331, 28 U.S.C. §1337, 28 U.S.C. §§2201-02, and 5 U.S.C. §§702-06. There exists between the parties an actual controversy, justiciable in character, in respect of which plaintiff requires a declaration of its rights by this Court. The matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs.

3. Plaintiff Loew's Theatres, Inc. is a corporation incorporated under the laws of the State of New York. Plaintiff's principal offices are located in New York, New York. Plaintiff, through its Lorillard division, is engaged in the manufacture, sale and distribution of cigarettes and other tobacco products.

4. The defendant Federal Trade Commission ("Commission") is a federal administrative agency created by the Federal Trade Commission Act, 15 U.S.C. §§41 et seq. The defendant LEWIS A. ENGMAN is the Chairman of the Commission. The defendants PAUL RAND DIXON, MAYO J. THOMPSON, M. ELIZABETH HANFORD, and STEPHEN NYE are members of the Commission. The defendant EDWARD H. LEVI is the Attorney General of the United States, who is authorized by Section 16(a) of the Act, 15 U.S.C. §56(a), to institute suit against plaintiff in the name of defendant UNITED STATES OF AMERICA. All individual defendants are sued in their official capacities.

5. The controversy between the parties arises over certain of plaintiff's advertisements and promotional materials for cigarettes, substantial portions of which were prepared or placed by plaintiff in this judicial district, and which were published and disseminated in this district. Venue is properly laid in this district by virtue of 28 U.S.C. §1391(e).

Statement of the Claim

6. Beginning in or about June 1971, plaintiff, and upon information and belief, certain other cigarette companies, voluntarily included in certain cigarette advertisements a depiction of the warning statement required to be placed on cigarette packages (but not in cigarette advertisements) pursuant to Section 4 of the Public Health Cigarette Smoking Act of 1969, 15 U.S.C. §1333 ("warning statement"). On or about July 1, 1971, the Commission served on plaintiff a proposed complaint which charged that plaintiff's disclosure of the warning statement in its advertising was insufficiently clear and conspicuous and therefore was a deceptive practice prohibited by Section 5 of the Federal Trade Commission Act, 15 U.S.C. §45. Upon information and belief, similar proposed complaints were served on five other cigarette companies. Plaintiff, and upon information and belief, the five other cigarette companies, were offered a six-month period within which to negotiate settlements of the proposed complaints.

7. Thereafter, plaintiff and the five other cigarette companies jointly commenced intensive negotiations with the staff of the Commission which covered, inter alia, the format, type size, type style, and other minute details of the warning statement to be included in newspaper, magazine and billboard advertising, transit cards, leaflets, direct-mail circulars, programs and paperback book inserts, and the manner and extent to which the warning statement was to be depicted in point-of-sale ("POS") promotional material. The negotiations extended over many months, and culminated in six substantially identical consent agreements and orders, formally issued by the Commission on March 30, 1972 (the "Orders"). A copy of the Order applicable to plaintiff is attached hereto as Exhibit A.

8. At all relevant times, plaintiff has diligently fulfilled its obligations under the Order. Plaintiff has established detailed procedures to insure that advertising and promotional materials subject to the Order contain a warning statement conforming to the requirements of the Order.

9. Since the Order became effective, the warning statement in conformity with the Order has been placed by plaintiff and the other cigarette companies in thousands of newspapers and magazine advertisements, POS pieces, billboards, and in other

advertising and promotional materials, which are covered by the Order.

10. In August and September 1972, plaintiff, and upon information and belief the five other cigarette companies, submitted compliance reports to the Commission as required by the Orders. Plaintiff's report of its compliance with the requirements of the Order included copies of current and representative advertisements and promotional material with the warning statement printed in conformity with the terms of the Order. In December 1972, the Commission advised plaintiff, and upon information and belief, each of the other five cigarette companies, that "on the assumption that the information submitted [in the compliance report] is accurate and complete, . . . no compliance action by the Commission is indicated at this time."

11. In a report dated December 31, 1972, the Commission publicly and officially reported to the Congress, pursuant to 15 U.S.C. §1337, that:

> "Advertisements containing the disclosure statement in the format required by these orders began to appear in May of 1972, and by the end of October, all cigarette advertisements observed by the Commission staff were being published in accordance with the terms of these orders." (Federal Trade Commission Report to Congress, December 31, 1972, p. 4.)

12. In its next annual report to Congress, dated December 31, 1973, but actually issued on January 23, 1974, the Commission publicly and officially repeated that "by October of 1972, almost all cigarette advertising published in this country was in compliance with the terms" of the Orders. (Federal Trade Commission Report to Congress, December 31, 1973, p. 1.)

13. Plaintiff, relying in good faith on the Commission's approval of its compliance report and on the Commission's official reports to Congress, believed that the Commission had accepted the manner in which plaintiff depicted the warning statement as fully conforming to the requirements of the Order and plaintiff prepared and placed its advertisements and promotional material in accordance with that reliance.

14. By letter dated March 25, 1974, the Commission's staff informed plaintiff that "The Compliance Division is instituting an inquiry into the manner of [plaintiff's] compliance" with certain provisions of the Order. Plaintiff fully cooperated in the ensuing investigation. Upon information and belief, in response to plaintiff's repeated requests that there should be discussions as to what would avoid future controversy regarding plaintiff's advertising and promotional materials, the staff repeatedly informed plaintiff's counsel that, as a pre-condition to such discussions, plaintiff would have to

agree to join with the other five cigarette companies whose compliance was similarly questioned in a lump sum payment of about six million dollars as penalties for alleged past violations of the Orders. Plaintiff would not and could not accept this demand because plaintiff had not violated the Order and the staff's demand gave no assurance that future controversy would be avoided.

15. By letter to plaintiff, dated August 1, 1975, and upon information and belief, by letters to the five other cigarette companies, the Commission stated that it "had determined" that plaintiff and each of the other five cigarette companies "ha[ve] violated" the Orders in various respects. The letter stated that the Commission had determined to commence "an action for civil penalties and other relief" with respect to certain alleged violations of the Order. With only a few exceptions, the Commission's letter to plaintiff failed to even identify the specific advertisements and promotional materials which the Commission deemed to be violative of the Order, nor did it indicate what measures plaintiff should take to bring its advertising into compliance. With respect to other alleged violations, the Commission stated that it would "hold a civil penalty action in abeyance for 180 days," but if at the expiration of such period

plaintiff had not "corrected" these violations in accordance with the Commission's demands, "civil penalties and other relief" would be sought by the Commission for such alleged violations. A copy of the Commission's August 1, 1975 letter to plaintiff is attached hereto as Exhibit B.

16. The determinations in the Commission's letter that plaintiff violated the Order are largely vague and ambiguous, and to the extent they can be understood, are based on erroneous and unwarranted interpretations of the express terms of the Order. These determinations repudiate the Commission's report to Congress that plaintiff's advertising was in compliance with the Order, disregard plaintiff's good faith reliance on such statements, and are inconsistent with the Commission's earlier acceptance of plaintiff's compliance report.

17. By reason of the provisions of Section 5 of the Act, 15 U.S.C. §45, and paragraph 8 of the Agreement for a Consent Order, the Commission's determination exposes plaintiff to the immediate and continuing threat of substantial civil penalties.

18. The Commission's August 1, 1975 letter has a direct and immediate effect on the day-to-day business of plaintiff, which advertises continually and extensively to promote the sale of its products. Plaintiff would encounter serious

difficulties in altering its advertising because the Commission has never specified the corrective measures it considers necessary for compliance with the Order. Moreover, even if the Commission had informed plaintiff with sufficient specificity of the changes it believes should be made in plaintiff's advertising, compliance with the Commission's interpretation would require substantial and costly revisions by plaintiff to millions of dollars worth of advertising and promotional materials.

19. By reason of the general and ordinary deadlines for the submission of advertising copy established by various media, it would be impossible for plaintiff forthwith to revise all of its advertising and promotional materials. As recognized by the provisions of paragraph G of the Order (Exhibit A, at 6-7), lead times ranging from 45 to 180 days are required with respect to advertising and promotional copy.

20. As a result of the Commission's letter to plaintiff dated August 1, 1975, plaintiff has been put in jeopardy either of having to discontinue at great expense advertising and promotional practices which plaintiff has been advised and believes in good faith to be lawful and in compliance with the requirements of the Order, or alternatively of continuing to utilize such advertising and promotional materials at the risk of incurring enormous and ever higher-mounting civil penalties. This

very real dilemma is compounded by the Commission's failure to specify sufficiently the respects in which it believes plaintiff's advertising to be in violation of the Order.

21. Plaintiff has no prompt, adequate and effective remedy at law, and the present action is the only available means for the protection of plaintiff's rights. Unless the Court grants plaintiff the relief sought herein, plaintiff will be effectively deprived of its property without due process of law, in violation of the Fifth Amendment to the United States Constitution; plaintiff will be denied the right to effective judicial review of agency action, guaranteed by the Administrative Procedure Act, and plaintiff will otherwise suffer irreparable injury.

WHEREFORE, plaintiff Loew's Theatres, Inc. respectfully prays this Court:

(i) To issue a judgment declaring that the determinations set forth in the Commission's letter dated August 1, 1975, are inconsistent with the provisions of the Order and are otherwise contrary to law;

(ii) To issue a judgment declaring that plaintiff is not liable for civil penalties;

(iii) To enter an order staying, pending final judgment, the accumulation of penalties under Section 5

of the Act, 15 U.S.C. §45, for alleged violations of the Order; and

(iv) To grant such other and further relief as the Court may deem just and appropriate.

Dated: New York, New York
August 15, 1975

WEIL, GOTSHAL & MANGES

By _____
A Member of the Firm

767 Fifth Avenue
New York, New York 10022
(212) 758-7800

Attorneys for Plaintiff
Loew's Theatres, Inc.

Of Counsel:

Ira M. Millstein
Irving Scher
Joseph W. Gelb

(Verified)

EXHIBIT A--CONSENT ORDER TO CEASE AND DESIST ANNEXED TO VERIFIED COMPLAINT OF LOEW'S THEATRES, INC.

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

Commissioners: Miles W. Kirkpatrick, Chairman
Paul Rand Dixon
Everette MacIntyre
Mary Gardiner Jones
David S. Dennison, Jr.

In the Matter of LORILLARD, a Division of Loew's Theatres, Inc., a corporation.	DOCKET NO. C-2180 DECISION AND ORDER.

The Commission having heretofore determined to issue its complaint charging the respondent named in the caption hereof with violation of the Federal Trade Commission Act, and the respondent having been served with notice of said determination and with a copy of the complaint the Commission intended to issue, together with a proposed form of order; and

The respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the complaint to issue herein, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having considered the agreement and having accepted same, and the agreement containing consent order having thereupon been placed on the public record for a period of thirty (30) days, and having duly considered the comments filed thereafter pursuant to Section 2.34(b) of its Rules, now in further conformity with the procedure prescribed in §2.34(b) of its Rules, the Commission hereby issues its complaint in the form contemplated by said agreement, makes the following jurisdictional findings, and enters the following order:

1. Respondent Lorillard, a Division of Loew's Theatres, Inc., is a corporation organized existing and doing business under and by virtue of the laws of the State of New York, with its principal office and place of business located at 200 East 42nd Street, in the City of New York, State of New York.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

I.

IT IS ORDERED that respondent Lorillard, a Division of Loew's Theatres, Inc., a corporation, its successors and assigns and respondent's officers, agents, representatives and employees directly or through any corporation, subsidiary, division or other device, in connection with the offering for sale, sale or distribution of cigarettes in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from advertising any such cigarette unless respondent makes in all advertisements of such cigarette a clear and conspicuous disclosure of the statement prescribed in Section 4 of the Public Health Cigarette Smoking Act of 1969 (Public Law 91-222) which reads:

"Warning: The Surgeon General Has Determined That Cigarette Smoking Is Dangerous to Your Health."

A. For the purposes of this Order, the term "cigarette" shall mean (A) any roll of tobacco wrapped in paper or in any substance not containing tobacco, and (B) any roll of tobacco wrapped in any substance containing tobacco which, because of its appearance, the type of tobacco used in the filler, or its packaging and labeling, is likely to be offered to, or purchased by, consumers as a cigarette described in subparagraph (A).

B. For the purposes of this Order, the term "advertisement" shall mean all advertising in newspapers, magazines, and other periodicals published and distributed in the United States and other periodicals distributed primarily to members or units of the Armed Forces of the United States located abroad, and advertisements appearing on billboards placed or located within the United States and in other materials as specified in Sections D, E, and F.

C. For the purposes of this Order, the term "clear and conspicuous disclosure" shall mean that

1. The language of the warning statement shall be precisely as prescribed by Congress in Section 4 of the Public Health Cigarette Smoking Act of 1969.

2. The warning statement shall be set in two horizontal lines parallel with the base of the advertisement, separated by leading equivalent to the lower case "x-height", excluding the ascending and descending letters, of the particular type size. In any case where the width of an advertisement in any printed medium is too narrow because of the columnar format, the warning statement may appear in three lines provided there is full compliance with all other requirements in this definition.

3. The warning statement in newspaper, magazine, and other periodical advertisements shall appear in Univers 47 (Fdy) type style. The type size to be employed shall be the following:

10-point type.....in newspaper, magazine, and other periodical advertisements of a trim size not larger than 65 square inches.

12-point type.....in newspaper, magazine, and other periodical advertisements of a trim size larger than 65 square inches but not larger than 110 square inches.

14-point type.....in newspaper, magazine, and other periodical advertisements of a trim size larger than 110 square inches but not larger than 180 square inches.

16-point type.....in newspaper, magazine, and other periodical advertisements of a trim size larger than 180 square inches.

A double full-page or a multiple full-page advertisement in any non-tabloid newspaper shall contain a separate warning statement in 16-point type on each page. A double full-page or multiple full-page advertisement in any tabloid newspaper, magazine or other periodical shall not be required to contain more than one warning statement but the type size requirement shall be determined by the total aggregated size of the entire advertisement.

An advertisement which occupies one full page and part of another page in any newspaper, magazine or other periodical shall not be required to contain more than one warning statement, but the type size requirement shall be determined by the total aggregated size of the entire advertisement, and the warning statement shall appear on the full page on which the advertisement appears. An advertisement which occupies part of each of two or more pages in any newspaper, magazine or other periodical shall not be required to contain more than one warning statement, but the type size requirement shall be determined by the total aggregated size of the entire advertisement, and the warning statement shall appear on that page which contains the greater (or greatest) part of the advertisement.

4. Every warning statement shall be set in a ruled rectangle. The size of the rectangle shall be determined by providing at both ends and at both top and bottom a space between the type block and the enclosing rule not less than the following spaces: where 10-point type is used in the warning statement, the rule shall be 8-points away from the type block; where 12-point type is used in the warning statement, the rule shall be 10-points away from the type block; where 14-point type is used in the warning statement, the rule shall be 12-points away from the type block; and where 16-point type is used in the warning statement, the rule shall be 14-points away from the type block. The width of the rule enclosing the rectangle shall be 1/4-point where 10-point type is used in the warning statement; 1/2-point where 12-point type is used in the warning statement; 3/4-point where 14-point type is used in the warning statement; and 1-point where 16-point type is used in the warning statement.

5. The warning statement shall be printed in black against a solid white background within the rectangle, and the enclosing rule shall be printed in black.

6. The warning statement in its rectangle in any newspaper, magazine, or other periodical advertisement shall be a separate element in each advertisement and shall not contain or include any part of any picture, design, illustration or text within the advertisement. The warning statement in its rectangle shall not be contained or included as an integral part of any specific pictorial design or illustration; in particular, it shall not be made a constituent part of a reproduction of the package of cigarettes. The warning statement in its rectangle may be printed or superimposed upon any pictorial background portion of any advertisement.

7. The warning statement in its rectangle in any newspaper, magazine, or other periodical advertisement may be positioned anywhere within the trim area of the advertisement, but shall not be positioned in the margin of any advertisement. The rectangle shall not be positioned immediately next to, or immediately contiguous to, any rectangular designs, elements, or similar geometric forms (other than a picture of the cigarette package) or immediately contiguous to any textual matter appearing in the advertisement.

8. Blurring or illegibility of the warning statement in its rectangle occurring for reasons beyond the control of the respondent shall not be in violation of this Order.

D. On billboards of a size 24-sheets and larger, the type size of the warning statement shall be not less than 2 inches in height, and the rectangle and the enclosing rule shall be of a size, shape, contrast, and placement, proportionately corresponding to those specified in Subsections C-1, -2, -4, -5, -6, and -7 for newspaper, magazine, and other periodical advertisements of a trim size larger than 180 square inches. On billboards of a size 6-, 7-, and 8-sheets the type size shall be not less than 3/4 inches, on those of a size 2- through 5-sheets the type size shall be not less than 1/2 inch, and the rectangle and the enclosing rule shall be of a size, shape, contrast and placement, proportionately corresponding to those specified in Subsections C-1, -2, -4, -5, -6, and -7 for newspaper, magazine, and other periodical advertisements of a trim size larger than 180 square inches. On 1-sheet billboards the type size shall be not less than 24-points, and the rectangle and the enclosing rule shall be of a size, shape, contrast and placement, proportionately corresponding to those specified in Subsections C-1, -2, -4, -5, -6 and -7 for newspaper, magazine, and other periodical advertisements of a trim size larger than 180 square inches. On all public transit side cards of any shape the type size shall be not less than 18-points, and the rectangle and the enclosing rule shall be of a size, shape, contrast and placement, proportionately corresponding to those specified in Subsections C-1, -2, -4, -5, -6, and -7 for newspaper, magazine, and other periodical advertisements of a trim size larger than 180 square inches. All public transit end cards shall comply with the minimum requirements for 1-sheet billboards. The type style on any billboard or transit card shall be Univers 47 (Fdy) or a similar font.

E. On all point-of-sale promotional materials exhibited to cigarette purchasers, which have a surface containing an advertising display area of more than 36 square inches, the warning statement within its rectangle shall be included in a type size proportional to the type size specified in the nearest page size category for newspaper, magazine, and other periodical advertisements, as specified in Subsections C-1, -2, -3, -4, -5, -6, and -7. In determining the size of the advertising display area in point-of-sale promotional materials consisting of two or more pages, the total advertising display area of each page on which any printed or graphic material appears shall be aggregated, and where the aggregate of the advertising display area, on which any printed or graphic material appears, exceeds 36 square inches, the warning statement within its rectangle shall be placed on one of those pages and proportionalized to the size of that page in accordance with Section C. The warning statement shall not be required on any non-media advertising and promotional materials offered or given to consumers; nor shall the warning statement be required on any promotional materials which are not for public display or public consumer exposure, and are distributed to cigarette wholesalers, dealers, and merchants.

F. All advertising contained in non-point-of-sale leaflets, direct-mail circulars, paperback book inserts, and programs shall contain the warning statement within its rectangle in a type size proportional to the type size specified in the nearest page size category for newspaper, magazine, and other periodical advertisements, as specified in Subsections C-1, -2, -3, -4, -5, -6, and -7.

G. Sections C, D, E, and F of this Order shall become effective sixty (60) days after it is finally issued, but to meet the general and ordinary deadlines for submission of advertising copy established by the medium by or in which the advertisement is to appear, the requirements of Sections C, D, E, and F shall not be applicable (a) to newspaper, magazine, or other periodical advertising for which the closing date on which an advertiser must, according to the regular schedule of that newspaper, magazine, or other periodical, deliver the advertising material in final form to the printer, to the publisher, or as to spectacolor-type, to the production house, is less than forty-five (45) days after the date on which this Order shall become effective; (b) to advertising appearing on billboards for which copy must, according to the earliest practical date for replacement, be delivered in final form to the printer or painted or assembled on such billboards less than forty-five (45) days after the date on which this Order shall become effective, but in any event, as to advertising appearing on billboards Sections C, D, E, and F

shall become applicable one hundred eighty (180) days from the date this Order shall become effective; (c) to advertising printed on non-point-of-sale leaflets, direct-mail circulars, paperback book inserts, and programs which is delivered in final form to the printer less than forty-five (45) days after the date on which this Order shall become effective, but in any event, as to advertising printed on non-point-of-sale leaflets, direct-mail circulars, paperback book inserts, and programs, Sections C, D, E, and F shall become applicable one hundred forty (140) days from the date this Order shall become effective; or (d) to point-of-sale promotional materials exhibited to cigarette purchasers, which have a surface containing an advertising display area of more than 36 square inches, delivered in final form to the printer less than forty-five (45) days from the date this Order shall become effective.

H. This Order shall not be applicable to signs on factories, plants, warehouses, and other facilities related to the manufacture or factory storage of cigarettes, to corporate or financial reports, or to employment advertising, or to advertising in tobacco trade publications not circulated to consumers.

II.

IT IS FURTHER ORDERED that the respondent corporation shall forthwith distribute a copy of this order to each of its operating divisions or departments.

IT IS FURTHER ORDERED that respondent notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order.

IT IS FURTHER ORDERED that respondent shall, within sixty (60) days after service upon it of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with the order to cease and desist.

By the Commission; Commissioner Jones' statement is attached.

S E A L

Charles A. Tobin,
Secretary.

ISSUED: March 30, 1972

Statement of Commissioner Jones

I dissent to the Commission's acceptance of these consent agreements because of their provisions respecting the clear and conspicuous disclosure requirements of the Warning. The Commission had no proper empirical or clinical basis on which to support the instant order provisions and hence had no reason to believe that the required disclosures would in fact be clear and conspicuous to the casual readers of the magazines in which these advertisements are intended to appear.

A 101

FXHIBIT B--COMMISSION'S LETTER AUGUST 1, 1975 ANNEXED TO VERIFIED COMPLAINT OF LOEW'S THEATRES, INC.

FEDERAL TRADE COMMISSION
WASHINGTON, D. C. 20580

OFFICE OF THE SECRETARY

AUG 1 1975

Lorillard Division
Loew's Theatres, Inc.
200 East 42nd Street
New York, New York 10017

Attention: Arthur Stevens, Esquire
General Counsel

Re: Lorillard, a Division of Loew's Theatres, Inc.
Docket No. C-2180

Dear Mr. Stevens:

The Federal Trade Commission has determined that Lorillard has violated the above-captioned order by failing in certain cigarette advertisements to disclose the required health warning and by failing in other cigarette advertisements to disclose the health warning in the clear and conspicuous manner that is required by the order.

The Commission will, therefore, pursuant to the provisions of 15 U.S.C. 56(a)(1), notify the Attorney General of its intention to commence for these violations an action for civil penalties and other relief. For certain other violations of the order, the Commission will hold a civil penalty action in abeyance for 180 days. If, however, at the expiration of that period, Lorillard has not corrected these other violations, the Commission will seek civil penalties and other relief for them as well.

The Commission will immediately notify the Department of Justice of its intention to file a complaint for the following violations of the order:

1) The advertisement of cigarettes on display panels inserted since July 1972 into vending machines which fail to disclose the required health warning in violation of Section I-E of the order.

2) The advertisement of cigarettes on other promotional materials exhibited to the public since July, 1972, such as paperback book inserts, counter racks and the Kent calendar envelope which fail to disclose the health warning or which disclose the health warning in a type size smaller than that required for the entire advertising display area in violation of Section I-E or I-F of the order.

3) The advertisement of cigarettes in newspapers, magazines or other periodicals published and distributed in the United States since July, 1972, which appeared to the public with a disclosure of the health warning in a type style or type size smaller than that required for the advertisement's trim size; or, as for example, the "Kent Championship Sweepstakes" and "The Newport Sweepstakes" advertisements, which positioned the warning rectangle immediately next to, or immediately contiguous to, other rectangular designs, elements or similar geometric forms, in violation of Section I-C of the order.

4) Foreign language cigarette advertisements published and distributed, or otherwise exhibited to the public, since November 13, 1973, which violate the order by disclosing the health warning in a language different from that principally used by the advertisement or in an inaccurate translation of the statement prescribed by Congress in Section 4 of the Public Health Cigarette Smoking Act of 1969.

The Commission has also determined that Lorillard has failed to disclose the health warning on billboard and transit card advertisements clearly and conspicuously as required by the order. Section I-D of the order specifies minimum type sizes for different sizes of billboards and transit cards. Compliance with that provision, however, does not satisfy the overriding requirement established by the order that in these media

the disclosure must be clear and conspicuous. Disclosures which conform to the minimum size provisions of Section I-D but which nonetheless are not of sufficient size for the warning to be read by those who view the advertisement cannot be deemed to comply with the order.

Moreover, the Commission has also determined that the typographic composition of the health warning utilized by your company violates Sections I-C-2 and I-C-4 of the order by measuring the requisite leading and spacing distances from the type faces and not from the type shoulders.

The Commission will not, however, immediately initiate a civil penalty action regarding violations pertaining to the size of the warning on billboards and transit cards or pertaining to the typographic requirements for the leading and spacing of the warning if those violations are remedied within 180 days from receipt of this order.

The Commission received and carefully considered your company's Statement of Position prior to making its determination in this matter.

By direction of the Commission.

Charles A. Tobin
Secretary

cc: H. Thomas Austern, Esquire
c/o Covington & Burling
888 - 16th Street, N. W.
Washington, D. C. 20006

Horace R. Kornegay, Esquire
c/o The Tobacco Institute, Inc.
1776 K Street, N. W.
Washington, D. C. 20006

VERIFIED COMPLAINT OF AMERICAN BRANDS, INC.

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK

(E)

AMERICAN BRANDS, INC., Plaintiff, -against- FEDERAL TRADE COMMISSION; LEWIS A. ENGMAN, Chairman, Federal Trade Commission; PAUL RAND DIXON, MAYO J. THOMPSON, M. ELIZABETH HANFORD, and STEPHEN NYE, Members, Federal Trade Commission; EDWARD H. LEVI, Attorney General of the United States; and UNITED STATES OF AMERICA, Defendants.	75 Civ. ____ ( ) VERIFIED COMPLAINT FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF

Plaintiff, by its attorneys, complaining of the defendants, alleges:

Parties, Jurisdiction and Venue

1. Plaintiff, American Brands, Inc. ("American"), is a New Jersey corporation with its principal place of business at 245 Park Avenue, New York, New York. Plaintiff is, among other things, engaged in the manufacture, sale and distribution of cigarettes.

2. Defendant, Federal Trade Commission ("FTC"), was created and established by an Act of Congress known

as the Federal Trade Commission Act, 15 U.S.C. § 41 et seq. (the "Act").

3. Defendant, Lewis A. Engman, is the Chairman of the FTC and defendants Paul Rand Dixon, Mayo J. Thompson, M. Elizabeth Hanford and Stephen A. Nye, are Commissioners of the FTC.

4. Defendant, Edward H. Levi, is the Attorney General of the United States, who is authorized by § 16(a) of the Act, 15 U.S.C. § 56(a), to institute suit against American in the name of defendant, United States of America.

5. All individual defendants are sued in their official capacities.

6. This action arises under the Act, 15 U.S.C. § 41 et seq., the Administrative Procedure Act, 5 U.S.C. § 551 et seq. and the First and Fifth Amendments to the Constitution of the United States of America. This Court has jurisdiction under 28 U.S.C. §§ 1331, 1337, 2201 and 2202 and 5 U.S.C. §§ 702-06. The amount in controversy exceeds the sum of ten thousand dollars, exclusive of interest and costs, and there exists between the parties an actual controversy, justiciable in character, in respect of which American requires a declaration of its rights.

7. Venue is properly laid in this district by virtue of 28 U.S.C. § 1391(e).

Statement of Facts
Common to All Counts

8. On July 1, 1971, the FTC sent American a proposed complaint to be issued against American if a voluntary agreement could not be reached with American disposing of the proposed claims. The proposed complaint alleged that cigarette advertising of American violated Section 5 of the Act in that the advertising failed to include a clear and conspicuous disclosure of the warning statement prescribed for cigarette packages (but not for cigarette advertising) in Section 4 of the Public Health Cigarette Smoking Act of 1969, 15 U.S.C. § 1333 (herein "warning statement"). A copy of that proposed complaint is attached as Exhibit A.

9. Identical proposed complaints were sent to five other cigarette manufacturers at the same time. American and those five cigarette manufacturers are referred to herein as "cigarette manufacturers" or "manufacturers."

10. Thereafter in accordance with the desire of the FTC Staff for unified negotiation, the six cigarette manufacturers designated three representatives to negotiate for them jointly with the FTC Staff to reach voluntary agreements.

11. Over a seven-month period from July 1, 1971

to January 31, 1972, the FTC Staff and the representatives of the cigarette manufacturers negotiated identical, novel, detailed and sweeping Consent Orders. The proposed orders which had accompanied the proposed complaints would have required the cigarette manufacturers to cease and desist from all advertising which did not clearly and conspicuously disclose the warning statement. The proposed orders did not define "clear and conspicuous disclosure" and at the outset of the negotiations, the FTC Staff and counsel for the cigarette manufacturers agreed that it would be imperative to endeavor to particularize what clear and conspicuous disclosure would require by providing concrete specifications for the advertising warning statement.

12. The negotiations regarding a warning statement in advertising covered, among other things, the format, type size, type style, and other minute details with respect to newspaper, magazine and billboard advertising, transit cards, and paperback book inserts and the manner and extent to which the warning statement was to be included in certain point-of-sale promotional material.

13. These negotiations were closely monitored by the Commission itself which reviewed "mock-up" advertisements demonstrating alternative presentations of the warning statement, and approved or rejected various

approaches which its Staff and the cigarette manufacturers had developed.

14. The negotiations initially focused on a definition of clear and conspicuous disclosure for newspaper and magazine advertisements. The FTC Staff's first proposal, on August 9, 1971, was for an octagonal-shaped warning statement simulating a traffic stop sign, to be printed in black against a white background, which would occupy a fixed area of 10 to 12 percent of the total advertisement.

15. The cigarette manufacturer's counterproposal contemplated that the warning statement would appear in two lines and would be framed in a ruled rectangle. That proposal was patterned on the warning statement which, since May 1971, had been formulated by The New York Times for its cigarette advertising. The type size of the text would be either 8, 10, 12, or 14 pts., depending on which of four size categories into which the overall dimensions of each advertisement would fall. The New York Times requirement had been 8 pts. regardless of the size of the ad.

16. The space -- or "leading" -- between the two lines of the text and the spacing between the text and the ruled rectangle would likewise vary in accordance with those four size categories. The approach that the

manufacturers' counterproposal advanced became the basis for the negotiations from which Section C of the final Consent Order evolved. A copy of the final Consent Order is attached as Exhibit B.

17. The FTC Staff advanced two difficulties with the manufacturers' counterproposal (i) The warning statement it provided for was considered too small and (ii) it would not invariably appear in black against a white background. Ensuing discussion centered on those two points.

18. On September 28, 1971, the FTC Staff and the representatives of the cigarette manufacturers made a presentation to a group of Commissioners, including the then Chairman Kirkpatrick. The Chairman intimated that the manufacturers' rectangular format might prove acceptable if the warning statement were enlarged and if it appeared in black against a white background. The Chairman also requested the opportunity to compare the mock-ups that the manufacturers had prepared with the proposals to the Staff. On September 30, these mock-ups were transmitted to him.

19. On November 12, 1971, the manufacturers agreed to present the warning statement in black against a white background but declined to increase the warning statement's size. On November 15, the FTC Staff made a

further presentation to the full Commission, and the Commission reportedly again reviewed mock-ups -- now in the black-on-white format -- illustrating the cigarette manufacturers' proposal. The staff advised that the Commission had expressed its readiness to accept the proposal if the warning statement were increased four points for each size category of advertisement. The manufacturers proposed an increase of two points and, at a meeting with the industry negotiators on December 3, 1971, the FTC Staff reported that this increase was acceptable to the Commission.

20. From the December 3, 1971 session forward, the negotiators began focusing on the remaining provisions to be included in the Consent Order.

21. One of the first subjects addressed by the negotiations was the proper format for the warning statement on billboards. At the very outset, the FTC Director of the Bureau of Consumer Protection indicated his position that it was impracticable for the billboard warning statement to be readily readable by passing motorists. He agreed that it would be sufficient if the warning statement were readable to a pedestrian walking past the billboard. In accordance with this Staff position, the manufacturers prepared a mock-up of a warning statement for a 30-sheet billboard in which the warning statement lettering was two inches in height. On December 9, 1971, the Staff viewed

this mock-up and expressed its satisfaction with it. The specifications embodied by that mock-up were adopted and are now contained in Section D of the Consent Order.

22. On December 3, 1971, the manufacturers expressed their fear that newspaper and magazine production practices beyond their control might cause defects in the appearance of the warning statement. The Staff acknowledged this practical problem and, accordingly, a provision was drafted shielding the manufacturers from responsbility for "blurring or illegibility" of the warning statement occurring because of the printing techniques used by publications. That provision is now Section C.8 of the Consent Order.

23. The problem of "newspaper shrinkage" was never mentioned during the negotiations, nor did the negotiators ever discuss displaying the warning statement on cigarette vending machines.

24. The FTC Director of the Bureau of Consumer Protection also indicated on December 3, 1971, that the warning statement should only appear on large point-of-sale promotional pieces with cigarette "advertising display areas." To reflect this position, it was eventually decided that only point-of-sale pieces whose "advertising display area" exceeded 36 square inches would be required to exhibit a warning statement. That "36 square inch" requirement is now contained in Section E of the Consent Order. Further

Section E provided that the warning statement was not required on any non-media advertising and promotional materials offered or given to consumers.

25. Late in December, 1971, the cigarette manufacturers again emphasized the need to provide realistic lead times during which they could begin the extensive process of conforming their advertising to the Consent Order. They also emphasized the need to determine to which media the Consent Order would apply retrospectively and for which media its application would be prospective. The result of those concerns was the drafting of the precise timetable governing the Consent Order's operation that is now Section G of the Consent Order. That section as adopted, specifically provided for point-of-sale pieces, that the Consent Order would apply only prospectively and that the manufacturers would not be required to search out point-of-sale pieces already in place and display the warning statement on them.

26. In the final stages of negotiation, a comprehensive provision which would have measured all advertising against an overall clear and conspicuous standard, independent of the Consent Order's detailed specific requirements, was proposed by the FTC Staff and rejected. The ground for its rejection was that it would defeat the Consent Order's initial basic underlying approach to specificity.

27. On January 21, 1972, an Agreement Containing a Consent Order to Cease and Desist (herein "Agreement") was signed by American and was thereafter accepted by the FTC on January 31, 1972. A copy of the Agreement is annexed as Exhibit C.

28. The Agreement provided, among other things, that it was for settlement purposes only and did not constitute an admission by American that the law had been violated as alleged, that the FTC had authority to require the warning statement, or that the required statement was necessary or correct and that American had denied all the allegations contained in the proposed complaint except for the jurisdictional facts.

29. On January 31, 1972, in announcing the identical Consent Orders, the FTC publicly noted that the six cigarette manufacturers made and advertised approximately ninety-nine percent of all cigarettes sold in the United States. The FTC also publicly announced that it would thereafter carefully monitor compliance with those Consent Orders.

30. The six Consent Agreements and Orders were formally issued by the FTC on March 30, 1972.

31. The warning statement prescribed by the Consent Orders has appeared in thousands of cigarette advertise-

ments. Since 1970, the identical notice has appeared on cigarette cartons and packages pursuant to Federal statute.

32. American has complied and continues to comply with the provisions of the Consent Order.

33. On or about April 21, 1972, the FTC's Compliance Staff wrote to each of the six manufacturers to request that they transmit reports of their compliance with the Consent Orders.

34. On September 12, 1972, American submitted a Report of Compliance to the FTC which included as exhibits copies of its then current advertisements which contained the warning statement as required by the Consent Order. A copy of the Report of Compliance, without exhibits, is annexed as Exhibit D.

35. In late December of 1972, the FTC advised American that "on the assumption that the information submitted is accurate and complete, . . . no compliance action by the Commission is indicated at this time." The full text of the FTC's letter to American is attached as Exhibit E.

36. By December 31, 1972, thousands of cigarette advertisements containing the warning statement pursuant to the Consent Orders had appeared and in its report

dated December 31, 1972, the FTC publicly and officially reported to Congress that:

> "Advertisements containing the disclosure statements in the format required by these orders began to appear in May of 1972, and by the end of October, all cigarette advertisements observed by the Commission staff were being published in accordance with the terms of these orders." (Federal Trade Commission Report to Congress, December 31, 1972, p. 4 transmitted to Congress pursuant to 15 U.S.C. § 1337(b)).

37. After another year of increased volume of advertisements with the warning statement, the FTC, in its next annual Report to Congress dated December 31, 1973, again publicly and officially repeated:

> "And by October of 1972, almost all cigarette advertising published in this country was in compliance with the terms of consent orders issued on March 30, 1972, by the Commission against the six major domestic cigarette advertisers to require a black-on-white disclosure of the [warning] statement." (Federal Trade Commission Report to Congress, December 31, 1973, p. 1 transmitted to Congress pursuant to 15 U.S.C. § 1337(b)).

38. American, relying upon the FTC's acceptance of its Compliance Report and upon the representations the FTC made to Congress, prepared and placed its advertisements in accordance with that reliance.

39. Thereafter, American heard nothing from the FTC with regard to its Consent Order until May 10, 1974. By letter of that date, the Staff of the Compliance Division of the FTC Bureau of Consumer Protection requested that

certain documentation be provided in an investigation of American's cigarette advertising because of asserted 'apparent violations" of the Consent Order. A copy of that letter is annexed hereto as Exhibit F.

40. Thereafter, during June 1974, American informed the FTC that it would, without waiving any rights, cooperate with the Staff in its investigation and submit requested documents even though American insisted its cigarette advertisements were in substantial compliance with the Consent Order.

41. Since then, at the request of the FTC, American has submitted in excess of 1,200 documents to the Staff. The documents were gathered, catalogued, indexed and submitted at considerable time and expense to American.

42. In addition, American made available for interviews by the FTC Staff six (6) employees of advertising agencies employed by American in the formulation and production of cigarette advertising subject to the Consent Order as well as five (5) employees of American, again at considerable time and expense.

43. Each of the aforementioned employees of American and its advertising agencies explained at length the extensive and elaborate procedures established by American to ensure compliance with the Consent Order.

44. FTC Staff members have suggested at diverse times that all of the advertisements of American since the effective date of the Consent Order were not in compliance. American's representatives have had extensive discussions with the Staff throughout the investigation in an attempt to obtain a specification of the claimed violations, to obtain a clarification of the specific advertisements as to which there were claimed violations or both, but have been unable to obtain specification or clarification.

45. American has consistently offered to discuss refinements in the presentation of the warning statement under the Consent Order. Notwithstanding (a) the fact that the basic objective of the FTC is not to exact penalties but to secure compliance, (b) that the design of the FTC's practices and rules is to promote voluntary compliance and avoid litigation and (c) the FTC's dedicated effort to help businessmen, both large and small, to bring their practices into compliance with the law without resort to litigation, the Staff has during the course of the investigation demanded from American monies of upwards of $1,000,000 as penalties, or "a substantial amount that would hurt," and has refused to advance definitive past violations by American of the Consent Order and has refused even to discuss any way in which American might avoid the alleged violations in future advertising.

46. The FTC Staff involved with the investiga-

tion has repeatedly indicated its hostility and bias in regard to cigarette smoking and the existence of cigarette advertising thus depriving American in violation of the FTC's own rules of the impartiality and counsel the FTC claims it affords to those under its jurisdiction.

47. By letter to American dated August 1, 1975, the FTC stated that it "has determined" that American "has violated" the Consent Orders. The letter stated that the FTC intended "to commence for these violations an action for civil penalties and other relief." The letter charged certain alleged violations of the Consent Order, namely:

"(1) The advertisement of cigarettes on display panels inserted since July 1972 into vending machines which fail to disclose the required health warning in violation of Section I-E of the order.

"(2) The advertisement of cigarettes on other promotional materials exhibited to the public since July, 1972, such as counter racks and shopping bags which fail to disclose the health warning or which disclose the health warning in a type size smaller than that required for the entire advertising display area in violation of Section I-E or I-F of the order.

"(3) The advertisement of cigarettes in newspapers, magazines or other periodicals published and distributed in the United States since July, 1972, which appeared to the public with a disclosure of the health warning in a type style or type size smaller than that required for the advertisement's trim size, in violation of Section I-C of the order.

"(4) Foreign language cigarette advertisements published and distributed, or otherwise exhibited to the public, since November 13, 1973, which violate the order by disclosing the health warning in a language different

> from that principally used by the advertisement or in an inaccurate translation of the statement prescribed by Congress in Section 4 of the Public Health Cigarette Smoking Act of 1969."

A copy of the FTC's letter to American is attached hereto as Exhibit G.

48. With respect to alleged violations pertaining to the size of the warning on billboards and transit cards and the typographic requirements for the leading and spacing of the warning, the FTC's letter stated that it would "hold a civil penalty action in abeyance for 180 days," but if at the expiration of such period American had not "corrected" these violations in accordance with the Commission's demands, "civil penalties and other relief" would be sought by the FTC for such alleged violations.

49. The FTC's letter did not identify particular advertisements which the Commission deemed to be violative of the Order, nor did it indicate what specific measures the respondents should take to bring their advertising into compliance.

50. The determinations set forth in the FTC's letter that American violated the Order are vague and ambiguous and, to the extent that they can be understood, are based on erroneous and unwarranted interpretations of the Consent Order, and repudiate the basis on which the

FTC had advised American, the other manufacturers, and Congress that American's advertising complied with the Consent Order and the basis upon which the representatives who negotiated the Consent Order for American and the other manufacturers advised American with respect to compliance.

51. By reason of the provisions of § 5 of the Act, 15 U.S.C. § 45, and paragraph 8 of the Consent Order, the FTC's letter of August 1, 1975 exposes American to the immediate and continuing threat of civil penalties. Because the FTC Staff has refused to specify the respects in which it believes American is in violation of the Consent Order, there is no way for American to modify its advertising to avoid continuing accumulation of civil penalties. Because the FTC has refused to discuss future compliance unless American makes an immediate substantial cash payment of unspecified amount there is no practicable or legal way for American to avoid continuing accumulation of civil penalties.

52. American has no prompt, adequate and effective remedy at law and the present action is the only available means for the protection of American's rights.

COUNT I

For Declaratory Judgment

53. Unless declaratory judgment is granted, American effectively will be denied its substantive rights

under the First and Fifth Amendments to the Constitution of the United States, will be denied the right to effective judicial review of agency action and it will be subject to the immediate and continuing threat of a civil penalty action under 15 U.S.C. § 45, as amended, pursuant to which substantial penalties may be imposed, and it will otherwise suffer irreparable harm and injury.

COUNT II

Injunction

54. Unless the FTC, the Attorney General and the United States are enjoined from commencing a civil penalty action, American will be subjected to the threat of continuing penalties under 15 U.S.C. § 45, as amended, in respect of alleged violations over which it has no practical or legal control.

COUNT III

Estoppel

55. Under the circumstances disclosed, the FTC is precluded and estopped from seeking civil penalties against American.

WHEREFORE, American respectfully prays this Court:

(i) To enter judgment declaring that the decisions and the determinations set forth in the Commission's letter

dated August 1, 1975 are inconsistent with the provisions of the Consent Order and are otherwise contrary to law;

(ii) To enter judgment that American is not liable for civil penalties;

(iii) To enter judgment enjoining commencement of a civil penalty action against American;

(iv) To enter an order staying, pending final judgment, the accumulation of penalties under Section 5 of the Act, 15 U.S.C. § 45, for alleged violations of the Order; and

(v) To grant such other and further relief as the Court may deem just and appropriate.

Dated: New York, New York
August 14, 1975

CHADBOURNE, PARKE, WHITESIDE & WOLFF

By _____
A Member of the Firm
30 Rockefeller Plaza
New York, New York 10020
(212) 541-5800

Eugene R. Anderson
ANDERSON, RUSSELL, KILL & OLICK, P.C.
630 Fifth Avenue
New York, New York 10020
(212) 397-9700

Attorneys for American Brands, Inc.

(Verified)

EXHIBIT A--COMMISSION'S PROPOSED COMPLAINT ANNEXED TO VERIFIED COMPLAINT OF AMERICAN BRANDS, INC.

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

In the Matter of AMERICAN BRANDS, INC., a corporation.	DOCKET NO.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that American Brands, Inc., hereinafter referred to as respondent, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH ONE: Respondent American Brands, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Jersey with its principal offices and place of business located at 245 Park Avenue, in the City of New York, State of New York.

PARAGRAPH TWO: Respondent is now, and for some time last past has been engaged in the manufacturing, advertising, sale and distribution of cigarettes.

PARAGRAPH THREE: In the course and conduct of its business as aforesaid, respondent now transports and causes said cigarettes, when sold, to be transported, and for some time last past has transported and has caused said cigarettes to be transported, from its places of business in the State of Virginia, and elsewhere, to purchasers in various other states of the United States and in the District of Columbia. Respondent maintains, and at all times herein has maintained, a substantial course of trade in said cigarettes in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PARAGRAPH FOUR: In the further course and conduct of its business as aforesaid, respondent at all times mentioned herein has been and is now in substantial competition in commerce with individuals, firms and corporations in the sale of cigarettes of the same general kind and nature as those sold by respondent.

PARAGRAPH FIVE: In the further course and conduct of its business as aforesaid, and for the purpose of inducing the sale of its said cigarettes, respondent has employed and now employs extensive advertising in many and various national and regional media.

PARAGRAPH SIX: In the further course and conduct of its business as aforesaid, respondent has represented and is now representing in advertisements, directly and by implication, that smoking of cigarettes is a desirable practice, with no apparent harmful effect on human health, without stating or disclosing that cigarette smoking is dangerous to human health.

PARAGRAPH SEVEN: In the further course and conduct of its business as aforesaid, respondent has received information from various sources by which it knew or had reason to believe that the smoking of cigarettes is dangerous to health. Notwithstanding its possession of such knowledge or reason to believe, respondent continued and is now continuing to advertise said cigarettes without disclosing to the public in its advertisements the fact that the smoking of said cigarettes is dangerous to health.

PARAGRAPH EIGHT: By advertising cigarettes for public consumption without disclosing in said advertisements that cigarette smoking is dangerous to health, respondent represents, directly or by implication, that its cigarettes are not dangerous to health.

Therefore, the advertisements referred to in Paragraphs 6, 7 and 8 above are false and misleading and the acts and practices referred to in said Paragraphs are deceptive acts and practices in commerce in violation of Section 5 of the Federal Trade Commission Act.

PARAGRAPH NINE: The advertising of cigarettes without disclosing in said advertisements that cigarette smoking is dangerous to health is in itself an unfair practice.

Therefore, the advertisements referred to in Paragraphs 6, 7, 8, and 9 above are unfair acts and practices in commerce in violation of Section 5 of the Federal Trade Commission Act.

PARAGRAPH TEN: The use by respondent of the said false and misleading advertisements and unfair and deceptive acts has had and now has the tendency and capacity to mislead and deceive a substantial portion of the purchasing public into the erroneous and mistaken belief that the smoking of the said cigarettes manufactured by respondent is not dangerous to health, and into the purchase of substantial quantities of cigarettes manufactured by respondent by reason of said erroneous and mistaken belief.

PARAGRAPH ELEVEN: The Congress of the United States, having determined to establish a comprehensive program to deal with cigarette labeling and advertising with respect to any relationship between smoking and health, has enacted the Public Health Cigarette Smoking Act of 1969. Section 4 of that Act expresses a determination by Congress that cigarette smoking is dangerous to health by providing:

> It shall be unlawful for any person to manufacture, import, or package for sale or distribution within the United States any cigarettes the package of which fails to bear the following statement: "Warning: The Surgeon General Has Determined That Cigarette Smoking Is Dangerous to Your Health."

The use by respondent of the said deceptive acts and practices as set forth in Paragraph Eight, and the said unfair acts and practices as set forth in Paragraph Nine, negates and overcomes any tendency or capacity which a warning on the cigarette package itself may have to impress on the public the dangers to health which accompany the smoking of respondent's said cigarettes.

PARAGRAPH TWELVE: The aforesaid acts and practices of respondent, as herein alleged, were and are all to the prejudice and injury of the public and of respondent's competitors, and constituted and now constitute unfair and deceptive acts and practices and unfair methods of competition in commerce in violation of Section 5 of the Federal Trade Commission Act.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this day of A.D., 19 , issues its complaint against said respondent.

NOTICE

Notice is hereby given to each of the respondents hereinbefore named that the day of A.D. 19 , at o'clock is hereby fixed as the time and

as the place when and where a hearing will be had before a hearing examiner of the Federal Trade Commission, on the charges set forth in this complaint, at which time and place you will have the right under said Act to appear and show cause why an order should not be entered requiring you to cease and desist from the violations of law charged in this complaint.

You are notified that the opportunity is afforded you to file with the Commission an answer to this complaint on or before the thirtieth (30th) day after service of it upon you. An answer in which the allegations of the complaint are contested shall contain a concise statement of the facts constituting each ground of defense; and specific admission, denial, or explanation of each fact alleged in the complaint or, if you are without knowledge thereof, a statement to that effect. Allegations of the complaint not thus answered shall be deemed to have been admitted.

If you elect not to contest the allegations of fact set forth in the complaint, the answer shall consist of a statement that you admit all of the material allegations to be true. Such an answer shall constitute a waiver of hearings as to the facts alleged in the complaint, and together with the complaint will provide a record basis on which the hearing examiner shall file an initial decision containing appropriate findings and conclusions and an appropriate order disposing of the proceeding. In such answer you may, however, reserve the right to submit proposed findings and conclusions and the right to appeal the initial decision to the Commission under Section 3.52 of the Commission's Rules of Practice for Adjudicative Proceedings.

Failure to answer within the time above provided shall be deemed to constitute a waiver of your right to appear and contest the allegations of the complaint and shall authorize the hearing examiner, without further notice to you, to find the facts to be as alleged in the complaint and to enter an initial decision containing such findings, appropriate conclusions and order.

The following is the form of order which the Commission has reason to believe should issue if the facts are found as alleged in the complaint. If, however, the Commission should conclude from record facts developed in any adjudicative proceedings in this matter that the proposed order provision as to American Brands, Inc., might be inadequate fully to protect the consuming public, the Commission may order such other relief as it finds necessary or appropriate.

ORDER

I

IT IS ORDERED that respondent American Brands, Inc., a corporation, its officers, representatives, agents, and employees, directly or through any corporate or other device, in connection with the advertising, offering for sale, or sale and distribution of cigarettes in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

> Advertising any such cigarettes unless respondent makes in all advertisements of such cigarettes a clear and conspicuous disclosure of the following statement:
>
> "Warning: The Surgeon General Has Determined That Cigarette Smoking Is Dangerous to Your Health."
>
> .....
>
> The Commission, upon development of full record facts in a litigated proceeding, will determine what constitutes clear and conspicuous disclosure with respect to the health hazards of cigarette smoking.

II

For purposes of this Order, the term "cigarette" means:

(A) any roll of tobacco wrapped in any substance not containing tobacco, and

(B) any roll of tobacco wrapped in any substance containing tobacco which, because of its appearance, the type of tobacco used in the

filler, or its packaging and labeling, is likely to be offered to, or purchased by, consumers as a cigarette described in sub-paragraph (a).

For purposes of this Order, the term "advertising" includes but is not limited to:

all advertisements published in newspapers, magazines, or other periodicals; billboards, posters, handbills, signs and decals; advertisements printed on matchbooks, calendars and other objects; point-of-sale display materials; distribution of sample cigarettes by mail or other means; commercial messages transmitted by any means of electronic communication, whether or not subject to the jurisdiction of the Federal Communications Commission; and all other written or other material used for promoting the sale or consumption of cigarettes. Provided, however, the term "advertising" does not include the labeling of packs, boxes, cartons and other containers in which cigarettes are sold to the consuming public.

III

IT IS FURTHER ORDERED that respondent forthwith distribute a copy of this order to each of its operating divisions involved in the advertising, promotion, distribution or sale of cigarettes.

IN WITNESS WHEREOF, the Federal Trade Commission has caused this, its complaint to be signed by its Secretary and its official seal to be hereto affixed at Washington, D.C., this day of

By the Commission.

Charles A. Tobin,
Secretary.

A 129

EXHIBIT B--FINAL CONSENT ORDER ANNEXED TO VERIFIED COMPLAINT OF AMERICAN BRANDS, INC.

UNITED STATES OF AMERICA

BEFORE

FEDERAL TRADE COMMISSION

DOCKET NO. C-2182

IN THE MATTER OF:

AMERICAN BRANDS, INC.

COMPLAINT

AND

ORDER

Exhibit B Annexed to Verified Complaint of American Brands, Inc.

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

In the Matter of	
AMERICAN BRANDS, INC.,	DOCKET NO. C-2182
a corporation.	

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that American Brands, Inc., a corporation, hereinafter referred to as respondent, has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH ONE: Respondent American Brands, Inc., a corporation, is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Jersey, with its principal office and place of business located at 245 Park Avenue, in the City of New York, State of New York.

PARAGRAPH TWO: Respondent is now, and for some time last past has been engaged in the manufacturing, advertising, sale and distribution of cigarettes.

PARAGRAPH THREE: In the course and conduct of its business as aforesaid, respondent now transports and causes said cigarettes, when sold, to be transported, and for some time last past has transported and has caused said cigarettes to be transported, from its places of business in the State of Virginia, and elsewhere, to purchasers in various other states of the United States and in the District of Columbia. Respondent maintains, and at all times herein has maintained, a substantial course of trade in said cigarettes in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PARAGRAPH FOUR: In the further course and conduct of its business as aforesaid, respondent at all times mentioned herein has been and is now in substantial competition in commerce with other corporations in the sale of cigarettes of the same general kind and nature as those sold by respondent.

PARAGRAPH FIVE: In the further course and conduct of its business as aforesaid, and for the purpose of inducing the sale of its said cigarettes, respondent has employed and now employs extensive advertising in many and various national and regional media.

PARAGRAPH SIX: In the further course and conduct of its business as aforesaid, respondent has represented and is now representing in advertisements, directly and by implication, that smoking of cigarettes is a desirable practice, with no apparent harmful effect on human health, without stating or disclosing that cigarette smoking is dangerous to human health.

PARAGRAPH SEVEN: In the further course and conduct of its business as aforesaid, respondent has received information from various sources by which it knew or had reason to believe that the smoking of cigarettes is dangerous to health. Notwithstanding its possession of such knowledge or reason to believe, respondent continued and is now continuing to advertise said cigarettes without disclosing to the public in its advertisements the fact that the smoking of said cigarettes is dangerous to health.

PARAGRAPH EIGHT: By advertising cigarettes to the public without disclosing in said advertisements that cigarette smoking is dangerous to health, respondent represents, directly or by implication, that its cigarettes are not dangerous to health.

Therefore, the advertisements referred to in Paragraphs 6, 7 and 8 above are false and misleading and the acts and practices referred to in said Paragraphs are deceptive acts and practices in commerce in violation of Section 5 of the Federal Trade Commission Act.

PARAGRAPH NINE: The advertising of cigarettes without disclosing in said advertisements that cigarette smoking is dangerous to health is in itself an unfair practice.

Therefore, the advertisements referred to in Paragraphs 6, 7, 8, and 9 above are unfair acts and practices in commerce in violation of Section 5 of the Federal Trade Commission Act.

PARAGRAPH TEN: The use by respondent of the said false and misleading advertisements and unfair and deceptive acts has had and now has the tendency and capacity to mislead and deceive a substantial portion of the purchasing public into the erroneous and mistaken belief that the smoking of the said cigarettes manufactured by respondent is not dangerous to health, and into the purchase of substantial quantities of cigarettes manufactured by respondent by reason of said erroneous and mistaken belief.

PARAGRAPH ELEVEN: The Congress of the United States, having determined to establish a comprehensive program to deal with cigarette labeling and advertising with respect to any relationship between smoking and health, has enacted the Public Health Cigarette Smoking Act of 1969. Section 4 of that Act provides:

> It shall be unlawful for any person to manufacture, import, or package for sale or distribution within the United States any cigarettes the package of which fails to bear the following statement: "Warning: The Surgeon General Has Determined That Cigarette Smoking Is Dangerous to Your Health."

The use by respondent of the said deceptive acts and practices as set forth in Paragraph Eight, and the said unfair acts and practices as set forth in Paragraph Nine, negates and overcomes any tendency or capacity which a warning on the cigarette package itself may have to impress on the public the dangers to health which accompany the smoking of respondent's said cigarettes.

PARAGRAPH TWELVE: The aforesaid acts and practices of respondent, as herein alleged, were and are all to the prejudice and injury of the public and of respondent's competitors,

and constituted and now constitute unfair and deceptive acts and practices and unfair methods of competition in commerce in violation of Section 5 of the Federal Trade Commission Act.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this 30th day of March A.D., 1972, issues its complaint against said respondent.

By the Commission.

Chas. A. Tobin

Charles A. Tobin
Secretary

S E A L

Exhibit B Annexed to Verified Complaint of American Brands, Inc.

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

In the Matter of	)
AMERICAN BRANDS, INC.,	)
a corporation.	)

ANSWER

Respondent, American Brands, Inc. by its attorneys, answers the Complaint herein as follows:

1. Respondent admits the allegations in Paragraphs 1 through 4 of the Complaint. Respondent denies each and every other allegation in the Complaint except that Respondent admits that it advertises in various media.

2. Further answering the Complaint, Respondent alleges as follows:

a. Respondent's cigarette advertising is truthful. Respondent's cigarette advertising makes no health claims and such advertising is not false, misleading or deceptive.

b. Respondent denies that any statement concerning the alleged relationship of smoking to health is required by law in Respondent's advertising. Neither the Public Health Cigarette Smoking Act of 1969, nor any other statute enacted by Congress, requires a statement in cigarette advertising. The aforesaid statute requires only that a warning notice be placed on each cigarette package, and Respondent has faithfully complied in every respect with the statute. Respondent denies that its advertising negates and overcomes the warning notice on the package as alleged in Paragraph 11.

c. Respondent denies that there is an adequate scientific basis for requiring a warning statement in cigarette advertising as alleged in the Complaint. Respondent states, contrary to the allegations in Paragraph 7, that many eminent scientists are of the view that cigarette smoking has not been scientifically established as causing the diseases or conditions

in human beings which are claimed to be associated with cigarette smoking, and they are further of the view that there is no ingredient or ingredients as found in cigarette smoke which has been shown to produce or be capable of producing any of the diseases or conditions in human beings claimed to be associated with cigarette smoking.

d. Apart from and in addition to the reasons set forth in subparagraph c, Supra, Respondent alleges that there is no necessity or justification for requiring a warning statement in cigarette advertising. The public is fully cognizant of the allegations which have been made with respect to the alleged relationship between smoking and health. Contrary to the allegations in Paragraph 10 of the Complaint, Respondent's cigarette advertising does not have the tendency and capacity to mislead the purchasing public.

e. Respondent denies that it has engaged in any deceptive or unfair acts or practices injurious either to Respondent's competitors or to the public generally.

f. Respondent denies that the Commission has jurisdiction or authority to require a warning statement in cigarette advertising.

WHEREFORE, Respondent respectfully requests that the Complaint herein be dismissed.

Respectfully Submitted,

Byrd F. Hutsell

Senior Vice President and General Counsel

Attorney for American Brands, Inc.

21st Day of January, 1972

Exhibit B Annexed to Verified Complaint of American Brands, Inc.

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

Commissioners: Miles W. Kirkpatrick, Chairman
Paul Rand Dixon
Everette MacIntyre
Mary Gardiner Jones
David S. Dennison, Jr.

In the Matter of	
AMERICAN BRANDS, INC.,	DOCKET NO. C-2182
a corporation.	DECISION AND ORDER.

The Commission having heretofore determined to issue its complaint charging the respondent named in the caption hereof with violation of the Federal Trade Commission Act, and the respondent having been served with notice of said determination and with a copy of the complaint the Commission intended to issue, together with a proposed form of order; and

The respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the complaint to issue herein, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having considered the agreement and having accepted same, and the agreement containing consent order having thereupon been placed on the public record for a period of thirty (30) days, and having duly considered the comments filed thereafter pursuant to Section 2.34(b) of its Rules, now in further conformity with the procedure prescribed in §2.34(b) of its Rules, the Commission hereby issues its complaint in the form contemplated by said agreement, makes the following jurisdictional findings, and enters the following order:

Exhibit B Annexed to Verified Complaint of American Brands, Inc.

1. Respondent American Brands, Inc., is a corporation organized existing and doing business under and by virtue of the laws of the State of New Jersey, with its principal office and place of business located at 245 Park Avenue, in the City of New York, State of New York.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

I.

IT IS ORDERED that respondent American Brands, Inc., a corporation, its successors and assigns and respondent's officers, agents, representatives and employees directly or through any corporation, subsidiary, division or other device, in connection with the offering for sale, sale or distribution of cigarettes in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from advertising any such cigarette unless respondent makes in all advertisements of such cigarette a clear and conspicuous disclosure of the statement prescribed in Section 4 of the Public Health Cigarette Smoking Act of 1969 (Public Law 91-222) which reads:

"Warning: The Surgeon General Has Determined That Cigarette Smoking Is Dangerous to Your Health."

A. For the purposes of this Order, the term "cigarette" shall mean (A) any roll of tobacco wrapped in paper or in any substance not containing tobacco, and (B) any roll of tobacco wrapped in any substance containing tobacco which, because of its appearance, the type of tobacco used in the filler, or its packaging and labeling, is likely to be offered to, or purchased by, consumers as a cigarette described in subparagraph (A).

B. For the purposes of this Order, the term "advertisement" shall mean all advertising in newspapers, magazines, and other periodicals published and distributed in the United States and other periodicals distributed primarily to members or units of the Armed Forces of the United States located abroad, and advertisements appearing on billboards placed or located within the United States and in other materials as specified in Sections D, E, and F.

C. For the purposes of this Order, the term "clear and conspicuous disclosure" shall mean that

1. The language of the warning statement shall be precisely as prescribed by Congress in Section 4 of the Public Health Cigarette Smoking Act of 1969.

2. The warning statement shall be set in two horizontal lines parallel with the base of the advertisement, separated by leading equivalent to the lower case "x-height", excluding the ascending and descending letters, of the particular type size. In any case where the width of an advertisement in any printed medium is too narrow because of the columnar format, the warning statement may appear in three lines provided there is full compliance with all other requirements in this definition.

3. The warning statement in newspaper, magazine, and other periodical advertisements shall appear in Univers 47 (Fdy) type style. The type size to be employed shall be the following:

10-point type.....in newspaper, magazine, and other periodical advertisements of a trim size not larger than 65 square inches.

12-point type.....in newspaper, magazine, and other periodical advertisements of a trim size larger than 65 square inches but not larger than 110 square inches.

14-point type.....in newspaper, magazine, and other periodical advertisements of a trim size larger than 110 square inches but not larger than 180 square inches.

16-point type.....in newspaper, magazine, and other periodical advertisements of a trim size larger than 180 square inches.

A double full-page or a multiple full-page advertisement in any non-tabloid newspaper shall contain a separate warning statement in 16-point type on each page. A double full-page or multiple full-page advertisement in any tabloid newspaper, magazine or other periodical shall not be required to contain more than one warning statement but the type size requirement shall be determined by the total aggregated size of the entire advertisement.

An advertisement which occupies one full page and part of another page in any newspaper, magazine or other periodical shall not be required to contain more than one warning statement, but the type size requirement shall be determined by the total aggregated size of the entire advertisement, and the warning statement shall appear on the full page on which the advertisement appears. An advertisement which occupies part of each of two or more pages in any newspaper, magazine or other periodical shall not be required to contain more than one warning statement, but the type size requirement shall be determined by the total aggregated size of the entire advertisement, and the warning statement shall appear on that page which contains the greater (or greatest) part of the advertisement.

4. Every warning statement shall be set in a ruled rectangle. The size of the rectangle shall be determined by providing at both ends and at both top and bottom a space between the type block and the enclosing rule not less than the following spaces: where 10-point type is used in the warning statement, the rule shall be 8-points away from the type block; where 12-point type is used in the warning statement, the rule shall be 10-points away from the type block; where 14-point type is used in the warning statement, the rule shall be 12-points away from the type block; and where 16-point type is used in the warning statement, the rule shall be 14-points away from the type block. The width of the rule enclosing the rectangle shall be 1/4-point where 10-point type is used in the warning statement; 1/2-point where 12-point type is used in the warning statement; 3/4-point where 14-point type is used in the warning statement; and 1-point where 16-point type is used in the warning statement.

5. The warning statement shall be printed in black against a solid white background within the rectangle, and the enclosing rule shall be printed in black.

6. The warning statement in its rectangle in any newspaper, magazine, or other periodical advertisement shall be a separate element in each advertisement and shall not contain or include any part of any picture, design, illustration or text within the advertisement. The warning statement in its rectangle shall not be contained or included as an integral part of any specific pictorial design or illustration; in particular, it shall not be made a constituent part of a reproduction of the package of cigarettes. The warning statement in its rectangle may be printed or superimposed upon any pictorial background portion of any advertisement.

7. The warning statement in its rectangle in any newspaper, magazine, or other periodical advertisement may be positioned anywhere within the trim area of the advertisement, but shall not be positioned in the margin of any advertisement. The rectangle shall not be positioned immediately next to, or immediately contiguous to, any rectangular designs, elements, or similar geometric forms (other than a picture of the cigarette package) or immediately contiguous to any textual matter appearing in the advertisement.

8. Blurring or illegibility of the warning statement in its rectangle occurring for reasons beyond the control of the respondent shall not be in violation of this Order.

D. On billboards of a size 24-sheets and larger, the type size of the warning statement shall be not less than 2 inches in height, and the rectangle and the enclosing rule shall be of a size, shape, contrast, and placement, proportionately corresponding to those specified in Subsections C-1, -2, -4, -5, -6, and -7 for newspaper, magazine, and other periodical advertisements of a trim size larger than 180 square inches. On billboards of a size 6-, 7-, and 8-sheets the type size shall be not less than 3/4 inches, on those of a size 2- through 5-sheets the type size shall be not less than 1/2 inch, and the rectangle and the enclosing rule shall be of a size, shape, contrast and placement, proportionately corresponding to those specified in Subsections C-1, -2, -4, -5, -6, and -7 for newspaper, magazine, and other periodical advertisements of a trim size larger than 180 square inches. On 1-sheet billboards the type size shall be not less than 24-points, and the rectangle and the enclosing rule shall be of a size, shape, contrast and placement, proportionately corresponding to those specified in Subsections C-1, -2, -4, -5, -6 and -7 for newspaper, magazine, and other periodical advertisements of a trim size larger than 180 square inches. On all public transit side cards of any shape the type size shall be not less than 18-points, and the rectangle and the enclosing rule shall be of a size, shape, contrast and placement, proportionately corresponding to those specified in Subsections C-1, -2, -4, -5, -6, and -7 for newspaper, magazine, and other periodical advertisements of a trim size larger than 180 square inches. All public transit end cards shall comply with the minimum requirements for 1-sheet billboards. The type style on any billboard or transit card shall be Univers 47 (Fdy) or a similar font.

E. On all point-of-sale promotional materials exhibited to cigarette purchasers, which have a surface containing an advertising display area of more than 36 square inches, the warning statement within its rectangle shall be included in a type size proportional to the type size specified in the nearest page size category for newspaper, magazine, and other periodical advertisements, as specified in Subsections C-1, -2, -3, -4, -5, -6, and -7. In determining the size of the advertising display area in point-of-sale promotional materials consisting of two or more pages, the total advertising display area of each page on which any printed or graphic material appears shall be aggregated, and where the aggregate of the advertising display area, on which any printed or graphic material appears, exceeds 36 square inches, the warning statement within its rectangle shall be placed on one of those pages and proportionalized to the size of that page in accordance with Section C. The warning statement shall not be required on any non-media advertising and promotional materials offered or given to consumers; nor shall the warning statement be required on any promotional materials which are not for public display or public consumer exposure, and are distributed to cigarette wholesalers, dealers, and merchants.

F. All advertising contained in non-point-of-sale leaflets, direct-mail circulars, paperback book inserts, and programs shall contain the warning statement within its rectangle in a type size proportional to the type size specified in the nearest page size category for newspaper, magazine, and other periodical advertisements, as specified in Subsections C-1, -2, -3, -4, -5, -6, and -7.

G. Sections C, D, E, and F of this Order shall become effective sixty (60) days after it is finally issued, but to meet the general and ordinary deadlines for submission of advertising copy established by the medium by or in which the advertisement is to appear, the requirements of Sections C, D, E, and F shall not be applicable (a) to newspaper, magazine, or other periodical advertising for which the closing date on which an advertiser must, according to the regular schedule of that newspaper, magazine, or other periodical, deliver the advertising material in final form to the printer, to the publisher, or as to spectacolor-type, to the production house, is less than forty-five (45) days after the date on which this Order shall become effective; (b) to advertising appearing on billboards for which copy must, according to the earliest practical date for replacement, be delivered in final form to the printer or painted or assembled on such billboards less than forty-five (45) days after the date on which this Order shall become effective, but in any event, as to advertising appearing on billboards Sections C, D, E, and F

shall become applicable one hundred eighty (180) days from the date this Order shall become effective; (c) to advertising printed on non-point-of-sale leaflets, direct-mail circulars, paperback book inserts, and programs which is delivered in final form to the printer less than forty-five (45) days after the date on which this Order shall become effective, but in any event, as to advertising printed on non-point-of-sale leaflets, direct-mail circulars, paperback book inserts, and programs, Sections C, D, E, and F shall become applicable one hundred forty (140) days from the date this Order shall become effective; or (d) to point-of-sale promotional materials exhibited to cigarette purchasers, which have a surface containing an advertising display area of more than 36 square inches, delivered in final form to the printer less than forty-five (45) days from the date this Order shall become effective.

H. This Order shall not be applicable to signs on factories, plants, warehouses, and other facilities related to the manufacture or factory storage of cigarettes, to corporate or financial reports, or to employment advertising, or to advertising in tobacco trade publications not circulated to consumers.

II.

IT IS FURTHER ORDERED that the respondent corporation shall forthwith distribute a copy of this order to each of its operating divisions or departments.

IT IS FURTHER ORDERED that respondent notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order.

IT IS FURTHER ORDERED that respondent shall, within sixty (60) days after service upon it of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with the order to cease and desist.

By the Commission; Commissioner Jones' statement is attached.

S E A L

Chas. A. Tobin

Charles A. Tobin,
Secretary.

ISSUED: March 30, 1972

Exhibit B Annexed to Verified Complaint of American Brands, Inc.

Statement of Commissioner Jones

I dissent to the Commission's acceptance of these consent agreements because of their provisions respecting the clear and conspicuous disclosure requirements of the Warning. The Commission had no proper empirical or clinical basis on which to support the instant order provisions and hence had no reason to believe that the required disclosures would in fact be clear and conspicuous to the casual readers of the magazines in which these advertisements are intended to appear.

EXHIBIT C--CONSENT ORDER TO CEASE AND DESIST ANNEXED TO VERIFIED COMPLAINT OF AMERICAN BRANDS, INC.

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

In the Matter of AMERICAN BRANDS, INC., a corporation.	FILE NO. 712 3733 AGREEMENT CONTAINING CONSENT ORDER TO CEASE AND DESIST

The agreement herein by and between American Brands, Inc., a corporation, proposed respondent in a proceeding the Federal Trade Commission intends to initiate, and its attorney, and counsel for the Federal Trade Commission, is entered into in accordance with the Commission's Rule governing consent order procedure. In accordance therewith the parties hereby agree that:

1. Proposed respondent, American Brands, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Jersey, with its principal office and place of business located at 245 Park Avenue, in the City of New York, State of New York.

2. Proposed respondent has been served with notice of the Commission's determination to issue its complaint charging it with violation of Section 5 of the Federal Trade Commission Act, and with a copy of the complaint the Commission intended to issue, together with a form of order the Commission believed warranted in the circumstances.

3. Proposed respondent admits all the jurisdictional facts set forth in the copy of the complaint here attached.

4. Proposed respondent waives:

(a) Any further procedural steps;

(b) The requirement that the Commission's decision contain a statement of findings of fact and conclusions of law; and

(c) All rights to seek judicial review or otherwise to challenge or contest the validity of the order entered pursuant to this agreement.

5. This agreement shall not become a part of the official record of the proceeding unless and until it is accepted by the Commission. If this agreement is accepted by the Commission it, together with the complaint contemplated thereby, will be placed on the public record for a period of thirty (30) days and information in respect thereto publicly released; and such acceptance may be withdrawn by the Commission if, within thirty (30) days after the acceptance, comments or views submitted to the Commission disclose facts or considerations which indicate that the order contained in the agreement is inappropriate, improper, or inadequate.

6. The Commission has not made in this proceeding any decision, adjudication or determination of any issue of law or fact presented by the complaint in this proceeding. This agreement is for settlement purposes only and does not constitute an admission by the proposed respondent that (1) the law has been violated as alleged in the said copy of the complaint hereto attached; (2) the Commission has the authority to require an affirmative statement with respect to any relationship between smoking and health in any cigarette advertising; or (3) the statement required by the order contained in the agreement is necessary or correct. It is understood that neither this settlement agreement nor compliance with the consent order shall constitute or in any way be deemed an admission in any administrative or judicial proceeding or in any private litigation. Except for the jurisdictional facts admitted in paragraph 3 above, proposed respondent denies all the allegations contained in said complaint. If respondent had not entered into the consent settlement of this proceeding in order to conserve the time and resources which would have been expended in litigation, the respondent would have answered the complaint in this proceeding in the form attached hereto.

7. This agreement contemplates that, if it is accepted by the Commission, and if such acceptance is not subsequently withdrawn by the Commission pursuant to the provision of §2.34(b) of the Commission's Rules, the Commission may, without further notice to proposed respondent, (1) issue its complaint in the form and substance of the complaint hereto attached and its decision containing the following order to cease and desist in disposition of the proceeding and (2) make information public in respect thereto. When so entered, the order to cease and desist shall have the same force and effect and shall become final and may be altered, modified or set aside in the same

manner and within the same time provided by statute for other orders; provided, however, that no part of this consent order is severable and upon the taking of any action by the Commission so as to alter, modify, or set aside this order, every defense alleged in the attached answer and all other defenses now or hereafter available to the proposed respondent may be raised. It is understood that the complaint being settled by this agreement containing the following consent order may be used by the Federal Trade Commission or any court enforcing the order in construing the terms of the order. It is further understood that the complaint or any allegations in the complaint shall not constitute an admission by respondent in any other official action, report or statement by the Federal Trade Commission, and that neither the complaint nor any allegations in the complaint shall be considered as an admission by the respondent in any other judicial or administrative proceeding or action.

8. Respondent has read the complaint and order contemplated hereby, and it understands that once the order has been issued, it will be required to file one or more compliance reports showing that it has fully complied with the order, and that it may be liable for a civil penalty of up to $5,000 for each violation of the order after it becomes final.

ORDER

I.

IT IS ORDERED that respondent American Brands, Inc., a corporation, its successors and assigns and respondent's officers, agents, representatives and employees directly or through any corporation, subsidiary, division or other device, in connection with the offering for sale, sale or distribution of cigarettes in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from advertising any such cigarette unless respondent makes in all advertisements of such cigarette a clear and conspicuous disclosure of the statement prescribed in Section 4 of the Public Health Cigarette Smoking Act of 1969 (Public Law 91-222) which reads:

> "Warning: The Surgeon General Has Determined That Cigarette Smoking Is Dangerous to Your Health."

Exhibit C Annexed to Verified Complaint of American Brands, Inc.

A. For the purposes of this Order, the term "cigarette" shall mean (A) any roll of tobacco wrapped in paper or in any substance not containing tobacco, and (B) any roll of tobacco wrapped in any substance containing tobacco which, because of its appearance, the type of tobacco used in the filler, or its packaging and labeling, is likely to be offered to, or purchased by, consumers as a cigarette described in subparagraph (A).

B. For the purposes of this Order, the term "advertisement" shall mean all advertising in newspapers, magazines, and other periodicals published and distributed in the United States and other periodicals distributed primarily to members or units of the Armed Forces of the United States located abroad, and advertisements appearing on billboards placed or located within the United States and in other materials as specified in Sections D, E, and F.

C. For the purposes of this Order, the term "clear and conspicuous disclosure" shall mean that

1. The language of the warning statement shall be precisely as prescribed by Congress in Section 4 of the Public Health Cigarette Smoking Act of 1969.

2. The warning statement shall be set in two horizontal lines parallel with the base of the advertisement, separated by leading equivalent to the lower case "x-height", excluding the ascending and descending letters, of the particular type size. In any case where the width of an advertisement in any printed medium is too narrow because of the columnar format, the warning statement may appear in three lines provided there is full compliance with all other requirements in this definition.

3. The warning statement in newspaper, magazine, and other periodical advertisements shall appear in Univers 47 (Fdy) type style. The type size to be employed shall be the following:

10-point type.....in newspaper, magazine, and other periodical advertisements of a trim size not larger than 65 square inches.

12-point type.....in newspaper, magazine, and other periodical advertisements of a trim size larger than 65 square inches but not larger than 110 square inches.

14-point type.....in newspaper, magazine, and other periodical advertisements of a trim size larger than 110 square inches but not larger than 180 square inches.

16-point type.....in newspaper, magazine, and other periodical advertisements of a trim size larger than 180 square inches.

A double full-page or a multiple full-page advertisement in any non-tabloid newspaper shall contain a separate warning statement in 16-point type on each page. A double full-page or multiple full-page advertisement in any tabloid newspaper, magazine or other periodical shall not be required to contain more than one warning statement but the type size requirement shall be determined by the total aggregated size of the entire advertisement. An advertisement which occupies one full page and part of another page in any newspaper, magazine or other periodical shall not be required to contain more than one warning statement, but the type size requirement shall be determined by the total aggregated size of the entire advertisement, and the warning statement shall appear on the full page on which the advertisement appears. An advertisement which occupies part of each of two or more pages in any newspaper, magazine or other periodical shall not be required to contain more than one warning statement, but the type size requirement shall be determined by the total aggregated size of the entire advertisement, and the warning statement shall appear on that page which contains the greater (or greatest) part of the advertisement.

4. Every warning statement shall be set in a ruled rectangle. The size of the rectangle shall be determined by providing at both ends and at both top and bottom a space between the type block and the enclosing rule not less than the following spaces: where 10-point type is used in the warning statement, the rule shall be 8-points away from the type block; where 12-point type is used in the warning statement, the rule shall be 10-points away from the type block; where 14-point type is used in the warning statement, the rule shall be 12-points away from the type block; and where 16-point type is used in the warning statement, the rule shall be 14-points away from the type block. The width of the rule enclosing the rectangle shall be 1/4-point where 10-point type is used in the warning statement; 1/2-point where 12-point type is used in the warning statement; 3/4-point where 14-point type is used in the warning statement; and 1-point where 16-point type is used in the warning statement.

5. The warning statement shall be printed in black against a solid white backgrcund within the rectangle, and the enclosing rule shall be printed in black.

6. The warning statement in its rectangle in any newspaper, magazine, or other periodical advertisement shall be a separate element in each advertisement and shall not contain or include any part of any picture, design, illustration or text within the advertisement. The warning statement in its rectangle shall not be contained or included as an integral part of any specific pictorial design or illustration; in particular, it shall not be made a constituent part of a reproduction of the package of cigarettes. The warning statement in its rectangle may be printed or superimposed upon any pictorial background portion of any advertisement.

7. The warning statement in its rectangle in any newspaper, magazine, or other periodical advertisement may be positioned anywhere within the trim area of the advertisement, but shall not be positioned in the margin of any advertisement. The rectangle shall not be positioned immediately next to, or immediately contiguous to, any rectangular designs, elements, or similar geometric forms (other than a picture of the cigarette package) or immediately contiguous to any textual matter appearing in the advertisement.

8. Blurring or illegibility of the warning statement in its rectangle occurring for reasons beyond the control of the respondent shall not be in violation of this Order.

D. On billboards of a size 24-sheets and larger, the type size of the warning statement shall be not less than 2 inches in height, and the rectangle and the enclosing rule shall be of a size, shape, contrast, and placement, proportionately corresponding to those specified in Subsections C-1, -2, -4, -5, -6, and -7 for newspaper, magazine, and other periodical advertisements of a trim size larger than 180 square inches. On billboards of a size 6-, 7-, and 8-sheets the type size shall be not less than 3/4 inches, on those of a size 2- through 5-sheets the type size shall be not less than 1/2 inch, and the rectangle and the enclosing rule shall be of a size, shape, contrast and placement, proportionately corresponding to those specified in Subsections C-1, -2, -4, -5, -6, and -7 for newspaper, magazine, and other periodical advertisements of a trim size larger than 180 square inches. On 1-sheet billboards the type size shall be not less than 24-points, and the rectangle and the enclosing rule shall be of a size, shape, contrast and placement, proportionately corresponding to those specified in Subsections C-1, -2, -4, -5, -6 and -7 for newspaper, magazine, and other periodical advertisements of a trim size larger than 180 square inches. On all public transit side cards of any shape the type size shall be

not less than 18-points, and the rectangle and the enclosing rule shall be of a size, shape, contrast and placement, proportionately corresponding to those specified in Subsections C-1, -2, -4, -5, -6, and -7 for newspaper, magazine, and other periodical advertisements of a trim size larger than 180 square inches. All public transit end cards shall comply with the minimum requirements for 1-sheet billboards. The type style on any billboard or transit card shall be Univers 47 (Fdy) or a similar font.

E. On all point-of-sale promotional materials exhibited to cigarette purchasers, which have a surface containing an advertising display area of more than 36 square inches, the warning statement within its rectangle shall be included in a type size proportional to the type size specified in the nearest page size category for newspaper, magazine, and other periodical advertisements, as specified in Subsections C-1, -2, -3, -4, -5, -6, and -7. In determining the size of the advertising display area in point-of-sale promotional materials consisting of two or more pages, the total advertising display area of each page on which any printed or graphic material appears shall be aggregated, and where the aggregate of the advertising display area, on which any printed or graphic material appears, exceeds 36 square inches, the warning statement within its rectangle shall be placed on one of those pages and proportionalized to the size of that page in accordance with Section C. The warning statement shall not be required on any non-media advertising and promotional materials offered or given to consumers; nor shall the warning statement be required on any promotional materials which are not for public display or public consumer exposure, and are distributed to cigarette wholesalers, dealers, and merchants.

F. All advertising contained in non-point-of-sale leaflets, direct-mail circulars, paperback book inserts, and programs shall contain the warning statement within its rectangle in a type size proportional to the type size specified in the nearest page size category for newspaper, magazine, and other periodical advertisements, as specified in Subsections C-1, -2, -3, -4, -5, -6, and -7.

G. Sections C, D, E, and F of this Order shall become effective sixty (60) days after it is finally issued, but to meet the general and ordinary deadlines for submission of advertising copy established by the medium by or in which the advertisement is to appear, the requirements of Sections C, D, E, and F shall not be applicable (a) to newspaper, magazine, or other periodical advertising for which the closing date on which an advertiser must, according to the regular schedule of that newspaper, magazine, or other periodical, deliver the advertising material

in final form to the printer, to the publisher, or as to spectacolor-type, to the production house, is less than forty-five (45) days after the date on which this Order shall become effective; (b) to advertising appearing on billboards for which copy must, according to the earliest practical date for replacement, be delivered in final form to the printer or painted or assembled on such billboards less than forty-five (45) days after the date on which this Order shall become effective, but in any event, as to advertising appearing on billboards Sections C, D, E, and F shall become applicable one hundred eighty (180) days from the date this Order shall become effective; (c) to advertising printed on non-point-of-sale leaflets, direct-mail circulars, paperback book inserts, and programs which is delivered in final form to the printer less than forty-five (45) days after the date on which this Order shall become effective, but in any event, as to advertising printed on non-point-of-sale leaflets, direct-mail circulars, paperback book inserts, and programs, Sections C, D, E, and F shall become applicable one hundred forty (140) days from the date this Order shall become effective; or (d) to point-of-sale promotional materials exhibited to cigarette purchasers, which have a surface containing an advertising display area of more than 36 square inches, delivered in final form to the printer less than forty-five (45) days from the date this Order shall become effective.

H. This Order shall not be applicable to signs on factories, plants, warehouses, and other facilities related to the manufacture or factory storage of cigarettes, to corporate or financial reports, or to employment advertising, or to advertising in tobacco trade publications not circulated to consumers.

II.

IT IS FURTHER ORDERED that the respondent corporation shall forthwith distribute a copy of this order to each of its operating divisions or departments.

IT IS FURTHER ORDERED that respondent notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order.

Exhibit C Annexed to Verified Complaint of American Brands, Inc.

IT IS FURTHER ORDERED that respondent shall, within sixty (60) days after service upon it of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with the order to cease and desist.

Signed this 21st day of January, 1972.

AMERICAN BRANDS, INC.

By _____
Robert B. Walker
Chairman of the Board and
Chief Executive Officer

Counsel for
American Brands, Inc.

_____
Basil F. Hetsko
Senior Vice President
and General Counsel

APPROVED:

_____
Gerald J. Thain
Assistant Director for
National Advertising

_____
Allen F. Brauninger

_____
Robert Pitofsky
Director, Bureau of
Consumer Protection

_____
Patrick E. Power

_____
Gale T. Miller

Counsel for the Federal Trade
Commission

Exhibit C Annexed to Verified Complaint of American Brands, Inc.

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

In the Matter of	)	
AMERICAN BRANDS, INC.,	)	DOCKET NO.
a corporation.	)	

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that American Brands, Inc., a corporation, hereinafter referred to as respondent, has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH ONE: Respondent American Brands, Inc., a corporation, is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Jersey, with its principal office and place of business located at 245 Park Avenue, in the City of New York, State of New York.

PARAGRAPH TWO: Respondent is now, and for some time last past has been engaged in the manufacturing, advertising, sale and distribution of cigarettes.

PARAGRAPH THREE: In the course and conduct of its business as aforesaid, respondent now transports and causes said cigarettes, when sold, to be transported, and for some time last past has transported and has caused said cigarettes to be transported, from its places of business in the State of Virginia, and elsewhere, to purchasers in various other states of the United States and in the District of Columbia. Respondent maintains, and at all times herein has maintained, a substantial course of trade in said cigarettes in commerce, as "commerce" is defined in the Federal Trade Commission Act.

Exhibit C Annexed to Verified Complaint of American Brands, Inc.

PARAGRAPH FOUR: In the further course and conduct of its business as aforesaid, respondent at all times mentioned herein has been and is now in substantial competition in commerce with other corporations in the sale of cigarettes of the same general kind and nature as those sold by respondent.

PARAGRAPH FIVE: In the further course and conduct of its business as aforesaid, and for the purpose of inducing the sale of its said cigarettes, respondent has employed and now employs extensive advertising in many and various national and regional media.

PARAGRAPH SIX: In the further course and conduct of its business as aforesaid, respondent has represented and is now representing in advertisements, directly and by implication, that smoking of cigarettes is a desirable practice, with no apparent harmful effect on human health, without stating or disclosing that cigarette smoking is dangerous to human health.

PARAGRAPH SEVEN: In the further course and conduct of its business as aforesaid, respondent has received information from various sources by which it knew or had reason to believe that the smoking of cigarettes is dangerous to health. Notwithstanding its possession of such knowledge or reason to believe, respondent continued and is now continuing to advertise said cigarettes without disclosing to the public in its advertisements the fact that the smoking of said cigarettes is dangerous to health.

PARAGRAPH EIGHT: By advertising cigarettes to the public without disclosing in said advertisements that cigarette smoking is dangerous to health, respondent represents, directly or by implication, that its cigarettes are not dangerous to health.

Therefore, the advertisements referred to in Paragraphs 6, 7 and 8 above are false and misleading and the acts and practices referred to in said Paragraphs are deceptive acts and practices in commerce in violation of Section 5 of the Federal Trade Commission Act.

PARAGRAPH NINE: The advertising of cigarettes without disclosing in said advertisements that cigarette smoking is dangerous to health is in itself an unfair practice.

Therefore, the advertisements referred to in Paragraphs 6, 7, 8, and 9 above are unfair acts and practices in commerce in violation of Section 5 of the Federal Trade Commission Act.

PARAGRAPH TEN: The use by respondent of the said false and misleading advertisements and unfair and deceptive acts has had and now has the tendency and capacity to mislead and deceive a substantial portion of the purchasing public into the erroneous and mistaken belief that the smoking of the said cigarettes manufactured by respondent is not dangerous to health, and into the purchase of substantial quantities of cigarettes manufactured by respondent by reason of said erroneous and mistaken belief.

PARAGRAPH ELEVEN: The Congress of the United States, having determined to establish a comprehensive program to deal with cigarette labeling and advertising with respect to any relationship between smoking and health, has enacted the Public Health Cigarette Smoking Act of 1969. Section 4 of that Act provides:

> It shall be unlawful for any person to manufacture, import, or package for sale or distribution within the United States any cigarettes the package of which fails to bear the following statement: "Warning: The Surgeon General Has Determined That Cigarette Smoking Is Dangerous to Your Health."

The use by respondent of the said deceptive acts and practices as set forth in Paragraph Eight, and the said unfair acts and practices as set forth in Paragraph Nine, negates and overcomes any tendency or capacity which a warning on the cigarette package itself may have to impress on the public the dangers to health which accompany the smoking of respondent's said cigarettes.

PARAGRAPH TWELVE: The aforesaid acts and practices of respondent, as herein alleged, were and are all to the prejudice and injury of the public and of respondent's competitors,

and constituted and now constitute unfair and deceptive acts and practices and unfair methods of competition in commerce in violation of Section 5 of the Federal Trade Commission Act.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this day of A.D., 1972, issues its complaint against said respondent.

By the Commission.

Charles A. Tobin
Secretary

SEAL

Exhibit C Annexed to Verified Complaint of American Brands, Inc.

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

In the Matter of	)
AMERICAN BRANDS, INC.,	)
a corporation.	)

ANSWER

Respondent, American Brands, Inc. by its attorneys, answers the Complaint herein as follows:

1. Respondent admits the allegations in Paragraphs 1 through 4 of the Complaint. Respondent denies each and every other allegation in the Complaint except that Respondent admits that it advertises in various media.

2. Further answering the Complaint, Respondent alleges as follows:

a. Respondent's cigarette advertising is truthful. Respondent's cigarette advertising makes no health claims and such advertising is not false, misleading or deceptive.

b. Respondent denies that any statement concerning the alleged relationship of smoking to health is required by law in Respondent's advertising. Neither the Public Health Cigarette Smoking Act of 1969, nor any other statute enacted by Congress, requires a statement in cigarette advertising. The aforesaid statute requires only that a warning notice be placed on each cigarette package, and Respondent has faithfully complied in every respect with the statute. Respondent denies that its advertising negates and overcomes the warning notice on the package as alleged in Paragraph 11.

c. Respondent denies that there is an adequate scientific basis for requiring a warning statement in cigarette advertising as alleged in the Complaint. Respondent states, contrary to the allegations in Paragraph 7, that many eminent scientists are of the view that cigarette smoking has not been scientifically established as causing the diseases or conditions

in human beings which are claimed to be associated with cigarette smoking, and they are further of the view that there is no ingredient or ingredients as found in cigarette smoke which has been shown to produce or be capable of producing any of the diseases or conditions in human beings claimed to be associated with cigarette smoking.

d. Apart from and in addition to the reasons set forth in subparagraph c, Supra, Respondent alleges that there is no necessity or justification for requiring a warning statement in cigarette advertising. The public is fully cognizant of the allegations which have been made with respect to the alleged relationship between smoking and health. Contrary to the allegations in Paragraph 10 of the Complaint, Respondent's cigarette advertising does not have the tendency and capacity to mislead the purchasing public.

e. Respondent denies that it has engaged in any deceptive or unfair acts or practices injurious either to Respondent's competitors or to the public generally.

f. Respondent denies that the Commission has jurisdiction or authority to require a warning statement in cigarette advertising.

WHEREFORE, Respondent respectfully requests that the Complaint herein be dismissed.

Respectfully Submitted,

Senior Vice President and General Counsel

Attorney for American Brands, Inc.

21st Day of January, 1972

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EXHIBIT D--REPORT OF COMPLIANCE ANNEXED TO VERIFIED COMPLAINT OF AMERICAN BRANDS, INC.

American Brands, Inc.
245 PARK AVENUE, NEW YORK, NEW YORK 10017

OFFICE OF THE
SENIOR VICE PRESIDENT
AND GENERAL COUNSEL

September 12, 1972

CERTIFIED MAIL
Return Receipt Requested

Federal Trade Commission
Division of Compliance
Washington, D.C. 20580

Attention: Thomas G. Egan, Esq.
Attorney

Re: American Brands, Inc. Docket C-2182

Dear Sirs:

Reference is made to the March 30, 1972 Order of the Commission in the above matter, to your letter of April 21, 1972 and to subsequent correspondence and conversations with regard thereto.

The American Tobacco Company Division of this Corporation, which is responsible for the sale and advertising of "cigarettes" as defined in the Order, has been furnished a copy of the Order as prescribed in Paragraph II thereof.

Enclosed herewith as Exhibits 1 through 142 are samples of all of the cigarette advertising prepared for this Company which had regular closing dates, or in the regular course had to have been delivered in final form to the printer, publisher or production house, or painted or assembled on billboards, on or after July 13, 1972. These Exhibits demonstrate full compliance with the Order.

Because of the bulk of some of the enclosed Exhibits, I have taken the liberty of enclosing only a single set, but I can provide a second set if you find it necessary.

Very truly yours,

Cynthia F. Hetsko

Cynthia F. Hetsko
Senior Vice President
and General Counsel

Enclosures

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EXHIBIT E--COMMISSION'S LETTER DECEMBER 20, 1972 ANNEXED TO VERIFIED COMPLAINT OF AMERICAN BRANDS, INC.

FEDERAL TRADE COMMISSION
WASHINGTON, D. C. 20580

OFFICE OF THE SECRETARY

DEC 20 1972

American Brands, Inc.,
245 Park Avenue,
New York, New York. 10017

Attention: Cyril F. Hetsko,
Senior Vice President
and General Counsel.

Re: American Brands, Inc.,
Docket C-2182.

Dear Mr. Hetsko:

The Commission is in receipt of your communication dated September 12, 1972, with attached exhibits, which you filed as a report showing the manner and form of your compliance with the order to cease and desist issued on March 30, 1972, in the above case.

The Commission has reviewed the report of compliance and has concluded, on the assumption that the information submitted is accurate and complete, that no compliance action by the Commission is indicated at this time. The Commission will not be precluded, however, from instituting appropriate action should it subsequently appear that such information is inaccurate or incomplete. In addition, the Commission may at any time reconsider, revoke, or rescind such determination should it subsequently appear that such information is inaccurate or incomplete, or if action had been taker in violation of the terms of the order.

By direction of the Commission.

Chas. A. Tobin

Charles A. Tobin,
Secretary.

EXHIBIT F--COMMISSION'S LETTER MAY 10, 1974 ANNEXED TO VERIFIED COMPLAINT OF AMERICAN BRANDS, INC.

FEDERAL TRADE COMMISSION
WASHINGTON, D. C. 20580

BUREAU OF
CONSUMER PROTECTION

American Brands, Inc.
245 Park Avenue
New York, New York 10017

MAY 10 1974

Attention: Cyril F. Hetsko, Esquire
Senior Vice-President and
General Counsel

Re: American Brands, Inc.
Docket Nos. C-2182 and 8799

Gentlemen:

On April 17, 1974, the staff of the Compliance Division met with Messrs. Horace Kornegay and Thomas Austern to discuss an inquiry currently being conducted into the manner of compliance the respondents are maintaining with the Commission's orders governing cigarette advertisements.

This is to inform you that our inquiry has revealed apparent violations of the Commission's orders requiring American Brands to disclose clearly and conspicuously the Surgeon General's health warning and "tar" and nicotine contents in its advertisements. This letter affords you the opportunity to express your own views in the matter before any staff recommendation is made to the Commission.

The first group of apparent violations to which I refer consists of a failure to print clearly and conspicuously "tar" and nicotine contents whenever your firm represents its cigarettes as being "low", "lower", or "reduced" in "tars." An example is the enclosed Iceberg 100's cigarette advertisement.

The second group of apparent violations arises from failure to print the health warning in advertisements of various trim sizes in Univers 47 (Fdy) style type of certain sizes. An example is the enclosed Twist cigarette advertisement. It printed the warning statement in a type size considerably smaller than that required.

Please transmit to me a tear sheet copy (not a proof) of every cigarette advertisement of a trim size of 110 square inches or larger which your firm has run since November 15, 1973. One example of every "mat", "velox", "film" or "plastic" that have been furnished periodicals and off which such cigarette advertisements have been printed should also be submitted. Please identify these tear sheets with the dates and places of their publication.

The third group of apparent violations arises from the failure to disclose clearly the health warning in every foreign language cigarette advertisement published in the United States. On August 3, 1973, the Commission posted in the Federal Register an Enforcement Policy Statement which reaffirmed the Commission's position that all its orders requiring clear disclosure of any information mean that the information must be disclosed in the same language as is principally used in the advertisement. In many Spanish-language advertisements for American Brands cigarettes that I have examined the health warning continues to appear in English.

Please transmit to me a tear sheet copy of every foreign language cigarette advertisement that you have had published in any periodical since November 15, 1973, in the United States, its territories or possessions. Please also send to me illustrations of each type of foreign language cigarette advertisement on billboards in the United States, its territories or possessions that you have used since February 1, 1974, and attach to each illustration a list of the exact locations in which billboards displaying such advertisements appear.

Please also transmit to me a copy of all agreements, correspondence, instructions, or memoranda which you have for internal use, for advertising agencies, and for periodicals governing the disclosure of the Surgeon General's warning. Submit also copies of all advertising material prepared for vending machines, promotional displays or paper-back book inserts, in use since July 1972, and describe the system of remuneration used in such advertising.

Please submit the requested materials and data to me by June 10, 1974. If there is any difficulty in transmitting all this information to me by that date, then please inform me as soon as possible. I shall be glad to answer any questions you may have with reference to this request. My telephone number is 202-963-6211.

Sincerely,

Terrence J Boyle

Terrence J. Boyle,
Attorney
Division of Compliance.

cc: Mr. H. Thomas Austern, Esquire
c/o Covington and Burling
888 16th Street, N.W.
Washington, D.C. 20006

EXHIBIT G--COMMISSION'S LETTER AUGUST 1, 1975 ANNEXED TO VERIFIED COMPLAINT OF AMERICAN BRANDS, INC.

FEDERAL TRADE COMMISSION
WASHINGTON, D. C. 20580

OFFICE OF THE SECRETARY

AUG 1 1975

American Brands, Inc.
245 Park Avenue
New York, New York 10017

Attention: Cyril Hetsko, Esquire
General Counsel

Re: American Brands, Inc.
Docket No. C-2182

Dear Mr. Hetsko:

The Federal Trade Commission has determined that American Brands has violated the above-captioned order by failing in certain cigarette advertisements to disclose the required health warning and by failing in other cigarette advertisements to disclose the health warning in the clear and conspicuous manner that is required by the order.

The Commission will, therefore, pursuant to the provisions of 15 U.S.C. 56(a)(1), notify the Attorney General of its intention to commence for these violations an action for civil penalties and other relief. For certain other violations of the order, the Commission will hold a civil penalty action in abeyance for 180 days. If, however, at the expiration of that period, American Brands has not corrected these other violations, the Commission will seek civil penalties and other relief for them as well.

The Commission will immediately notify the Department of Justice of its intention to file a complaint for the following violations of the order:

1) The advertisement of cigarettes on display panels inserted since July 1972 into vending machines which fail to disclose the required health warning in violation of Section I-E of the order.

2) The advertisement of cigarettes on other promotional materials exhibited to the public since July, 1972, such as counter racks and shopping bags which fail to disclose the health warning or which disclose the health warning in a type size smaller than that required for the entire advertising display area in violation of Sections I-E or I-F of the order.

3) The advertisement of cigarettes in newspapers, magazines or other periodicals published and distributed in the United States since July, 1972, which appeared to the public with a disclosure of the health warning in a type style or type size smaller than that required for the advertisement's trim size, in violation of Section I-C of the order.

4) Foreign language cigarette advertisements published and distributed, or otherwise exhibited to the public, since November 13, 1973, which violate the order by disclosing the health warning in a language different from that principally used by the advertisement or in an inaccurate translation of the statement prescribed by Congress in Section 4 of the Public Health Cigarette Smoking Act of 1969.

The Commission has also determined that American Brands has failed to disclose the health warning on billboard and transit card advertisements clearly and conspicuously as required by the order. Section I-D of the order specifies minimum type sizes for different sizes of billboards and transit cards. Compliance with that provision, however, does not satisfy the overriding requirement established by the order that in these media the disclosure must be clear and conspicuous. Disclosures which conform to the minimum size provisions of Section I-D but which nonetheless are not of sufficient size for the warning to be read by those who view the advertisement cannot be deemed to comply with the order.

Moreover, the Commission has also determined that the typographic composition of the health warning utilized by your company violates Sections I-C-2 and I-C-4 of the order by measuring the requisite leading and spacing distances from the type faces and not from the type shoulders.

The Commission will not, however, immediately initiate a civil penalty action regarding violations pertaining to the size of the warning on billboards and transit cards or pertaining to the typographic requirements for the leading and spacing of the warning if those violations are remedied within 180 days from receipt of this order.

The Commission received and carefully considered your company's Statement of Position prior to making its determination in this matter.

By direction of the Commission.

Chas. A. Tobin

Charles A. Tobin
Secretary

cc: H. Thomas Austern, Esquire
c/o Covington & Burling
888 - 16th Street, N. W.
Washington, D. C. 20006

Horace R. Kornegay, Esquire
c/o The Tobacco Institute, Inc.
1776 K Street, N. W.
Washington, D. C. 20006

VERIFIED COMPLAINT OF LIGGETT & MYERS INCORPORATED

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK

LIGGETT & MYERS INCORPORATED 75 Rockefeller Plaza New York, New York, a Delaware corporation, Plaintiff, -against- LEWIS A. ENGMAN, Chairman, Federal Trade Commission; PAUL RAND DIXON, MAYO J. THOMPSON, M. ELIZABETH HANFORD, and STEPHEN NYE, Members, Federal Trade Commission; FEDERAL TRADE COMMISSION; EDWARD H. LEVI, Attorney General of the United States; and UNITED STATES OF AMERICA, Defendants.	75 Civ. 4052 (CLB) VERIFIED COMPLAINT FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF

Plaintiff, Liggett & Myers Incorporated, for its Complaint herein, alleges as follows:

Parties, Jurisdiction and Venue

1. This is an action for a declaratory judgment that certain acts done and threatened to be done by the defendants in their official capacities are unauthorized by and contrary to law, and for injunctive and certain other relief.

2. This action arises under the Fifth Amendment to the Constitution of the United States, the Federal Trade

Commission Act (the "Act"), 38 Stat. 717 (1914), as amended, 15 U.S.C. §§ 41 et seq., and the Administrative Procedure Act, 5 U.S.C. §§ 551 et seq. This Court has jurisdiction pursuant to the provisions of 28 U.S.C. § 1331, 28 U.S.C. § 1337, 28 U.S.C. §§ 2201-02, and 5 U.S.C. §§ 702-06. There exists between the parties an actual controversy, justiciable in character, in respect of which plaintiff requires a declaration of its rights by this Court. The matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs.

3. Plaintiff Liggett & Myers Incorporated is a corporation incorporated under the laws of the State of Delaware. Plaintiff's principal offices are located in Durham, North Carolina at 4100 Roxboro Road. Plaintiff also maintains offices at 75 Rockefeller Plaza in New York, New York. Plaintiff is engaged, inter alia, in the manufacture, sale and distribution of cigarettes and other tobacco products.

4. The defendant LEWIS A. ENGMAN is the Chairman of the Federal Trade Commission (the "Commission"). The defendants PAUL RAND DIXON, MAYO J. THOMPSON, M. ELIZABETH HANFORD, and STEPHEN NYE are members of the Federal Trade Commission. The defendant FEDERAL TRADE COMMISSION was created and established by an Act of Congress known as the Federal Trade Commission Act, 15 U.S.C. §§ 41 et seq. The

defendant EDWARD H. LEVI is the Attorney General of the United States, who is authorized by Section 16(a) of the Act, 15 U.S.C. § 56(a), to institute suit against plaintiff in the name of defendant UNITED STATES OF AMERICA. All individual defendants are sued in their official capacities.

5. The controversy between the parties arises over certain of plaintiff's advertisements and promotional material for cigarettes, substantial portions of which were prepared or placed by plaintiff in this judicial district, and which were published and disseminated in this district. Venue is properly laid in this district by virtue of 28 U.S.C. § 1391(e)(2).

Statement of the Claim

6. Beginning in about May 1971, plaintiff and certain other cigarette companies voluntarily included in certain of their cigarette advertisements a depiction of the health warning required to be placed on cigarette packages (but not in cigarette advertisements) by Section 4 of the Public Health Cigarette Smoking Act of 1969, 15 U.S.C. § 1333 ("warning statement"). On or about July 1, 1971, the Commission served on plaintiff a proposed complaint which charged that plaintiff's disclosure of the warning statement in its advertising was insufficiently clear and conspicuous and therefore was a deceptive practice pro-

hibited by Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45. Similar proposed complaints were served on five other cigarette companies. The six respondents, including plaintiff, were offered a six-month period within which to negotiate settlements of the proposed complaints.

7. Thereafter, plaintiff and the five other respondents jointly commenced intensive negotiations with the staff of the Commission which covered, inter alia, the format, type size, type style, and other minute details of the warning statement to be included in newspaper, magazine and billboard advertising, transit cards, leaflets, direct-mail circulars, programs and paperback book inserts, and the manner and extent to which the warning statement was to be depicted in point-of-sale ("POS") promotional material. The negotiations extended over many months, and culminated in six consent agreements and orders, identical as to each respondent, formally issued by the Commission on March 30, 1972 (the "Orders"). A copy of the Order applicable to plaintiff is attached hereto as Exhibit A.

8. At all relevant times plaintiff has diligently fulfilled its obligations under the Order. Plaintiff has established detailed procedures to insure that advertising and promotional material subject to the Order contain a warning statement conform to the requirements of the Order.

9. Since the Order became effective, the warning statement in conformity with the Order has been placed by plaintiff and the other cigarette companies in thousands of newspaper and magazine advertisements, POS pieces, billboards, and other advertising and promotional material, which are covered by the Order.

10. In August and September 1972, plaintiff and the five other companies submitted compliance reports to the Commission as required by the Orders. Plaintiff's report of its compliance with the requirements of the Order included copies of current and representative advertisements and promotional material with the warning statement printed in conformity with the terms of the Order. In December 1972, the Commission advised each of the respondents, including plaintiff, that "on the assumption that the information submitted [in the compliance report] is accurate and complete, . . . no compliance action by the Commission is indicated at this time."

11. Based upon its examination of the compliance reports and other widely disseminated cigarette advertising available to it, in a report dated December 31, 1972, the Commission publicly and officially reported to the Congress, pursuant to 15 U.S.C. § 1337, that:

> "Advertisements containing the disclosure statement in the format required by these orders began to appear in May of 1972, and by the end of

October, all cigarette advertisements observed by the Commission staff were being published in accordance with the terms of these orders." (Federal Trade Commission Report to Congress, December 31, 1972, p. 4.)

12. In its next annual report to Congress, dated December 31, 1973, but actually issued on January 23, 1974, the Commission publicly and officially repeated that "by October of 1972, almost all cigarette advertising published in this country was in compliance with the terms" of the Orders. (Federal Trade Commission Report to Congress, December 31, 1973, p. 1.)

13. Plaintiff, relying in good faith on the Commission's approval of its compliance report and on the Commission's official reports to Congress, believed that the Commission had accepted the manner in which plaintiff depicted the warning statement as fully conforming to the requirements of the Order, and plaintiff prepared and printed its advertisements and promotional material in accordance with that reliance.

14. By letter dated May 16, 1974, the Commission's staff informed plaintiff that its Compliance Division was instituting an inquiry "into the manner of [plaintiff's] compliance" with certain provisions of the Order, and plaintiff cooperated in the ensuing investigation. During the investigation, plaintiff consistently offered to discuss refinements in the presentation of the warning

statement under the Consent Order. Notwithstanding (a) that the basic objective of the FTC is not to exact penalties but to secure compliance, (b) that the design of the FTC's practices and rules is to promote voluntary compliance and avoid litigation and (c) that the FTC is committed to a dedicated effort to help businessmen, both large and small, to bring their practices into compliance with the law without resort to litigation, the present staff demanded from plaintiff monies of upwards of $400,000 as penalties, or "a substantial amount that would hurt," and unless those monies were paid, refused even to discuss any way in which plaintiff might avoid the alleged violations in future advertising.

15. By letters to plaintiff and the five other cigarette manufacturers received by plaintiff August 4, 1975, the Commission stated that it "has determined" that plaintiff and each of the other manufacturers "ha[ve] violated" the Orders in various respects. The letter stated that the Commission had determined to commence "an action for civil penalties and other relief" with respect to certain alleged violations of the Order. With respect to other alleged violations, the Commission stated that it would "hold a civil penalty action in abeyance for 180 days," but if at the expiration of such period plaintiff had not "corrected" these violations in accordance with the Commission's demands, "civil penalties and other relief" would be sought by the

Commission for such alleged violations. A copy of the Commission's letter to plaintiff is attached hereto as Exhibit B.

16. The determinations in the Commission's letter that plaintiff violated the Order are largely vague and ambiguous and, to the extent they can be understood, are based on erroneous and unwarranted interpretations of the express terms of the Order. With one small exception, the Commission's letter does not identify specific advertisements and promotional materials which the Commission deemed to be violative of the Order, nor does it indicate what measures plaintiff should take to bring its advertising into compliance. The Commission's determinations repudiate the Commission's reports to Congress that plaintiff's advertising was in compliance with the Order, disregard plaintiff's good faith reliance on the Commission's public statements with respect to plaintiff's advertising and promotional material and are inconsistent with the Commission's earlier acceptance of plaintiff's compliance report.

17. By reason of the provisions of Section 5 of the Act, 15 U.S.C. § 45, and paragraph 8 of the Agreement Containing Order to Cease and Desist, the Commission's determination exposes plaintiff to the immediate and continuing threat of substantial civil penalties.

18. The Commission's August letter has a direct

and immediate effect on the day-to-day business of plaintiff, which advertises continually and extensively to promote the sale of its products. Plaintiff would encounter serious difficulties in altering its advertising because the Commission has never specified the corrective measures it considers necessary for compliance with the Order. Even if the Commission had informed plaintiff with sufficient specificity of the changes it believes should be made in plaintiff's advertising, compliance with the Commission's interpretation would require substantial revisions by plaintiff in millions of dollars worth of advertising and promotional materials.

19. By reason of the general and ordinary deadlines for the submission of advertising copy established by various media, it would be impossible for plaintiff forthwith to revise all of its advertising and promotional materials. As recognized by the provisions of paragraph G of the Order (Exhibit A, at 7), lead times ranging from 45 to 180 days are required with respect to advertising and promotional copy.

20. As a result of the Commission's letter to plaintiff received August 4, 1975, plaintiff has been put in jeopardy either of having to discontinue at great expense advertising and promotional practices which plaintiff has been advised and believes in good faith to be lawful and

in compliance with the requirements of the Order, or alternatively of continuing to utilize such advertising and promotional materials at the risk of incurring enormous and ever higher-mounting civil penalties. This very real dilemma is compounded by the Commission's failure to specify sufficiently the respects in which it believes plaintiff's advertising to be in violation of the Order.

21. Plaintiff has no prompt, adequate and effective remedy at law, and the present action is the only available means for the protection of plaintiff's rights. Unless the Court grants plaintiff the relief sought herein, plaintiff will be effectively deprived of its property without due process of law, in violation of the Fifth Amendment to the United States Constitution; plaintiff will be denied the right to effective judicial review of agency action, guaranteed by the Administrative Procedure Act; and plaintiff will otherwise suffer irreparable injury.

WHEREFORE, plaintiff Liggett & Myers Incorporated respectfully prays this Court:

(i) To issue a judgment declaring that the determinations set forth in the Commission's letter received August 4, 1975, are inconsistent with the provisions of the Order and are otherwise contrary to law;

(ii) To issue a judgment declaring that plaintiff is not liable for civil penalties;

(iii) To enter an order staying, pending final judgment, the accumulation of penalties under Section 5 of the Act, 15 U.S.C. § 45, for alleged violations of the Order; and

(iv) To grant such other and further relief as the Court may deem just and appropriate.

Respectfully submitted,

GRAINGER R. BARRETT, Attorney-at-Law

Grainger R. Barrett

Grainger R. Barrett
75 Rockefeller Plaza
New York, New York 10020

Attorney for Plaintiff
Liggett & Myers Incorporated

(Verified)

A 178

EXHIBIT A--CONSENT ORDER TO CEASE AND DESIST
ANNEXED TO VERIFIED COMPLAINT OF
LIGGETT & MYERS INCORPORATED

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

Commissioners: Miles W. Kirkpatrick, Chairman
Paul Rand Dixon
Everette MacIntyre
Mary Gardiner Jones
David S. Dennison, Jr.

In the Matter of	
LIGGETT & MYERS INCORPORATED,	DOCKET NO. C-2185
a corporation.	DECISION AND ORDER.

The Commission having heretofore determined to issue its complaint charging the respondent named in the caption hereof with violation of the Federal Trade Commission Act, and the respondent having been served with notice of said determination and with a copy of the complaint the Commission intended to issue, together with a proposed form of order; and

The respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the complaint to issue herein, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having considered the agreement and having accepted same, and the agreement containing consent order having thereupon been placed on the public record for a period of thirty (30) days, and having duly considered the comments filed thereafter pursuant to Section 2.34(b) of its Rules, now in further conformity with the procedure prescribed in §2.34(b) of its Rules, the Commission hereby issues its complaint in the form contemplated by said agreement, makes the following jurisdictional findings, and enters the following order:

Exhibit A Annexed to Verified Complaint of Liggett & Myers Incorporated

1. Respondent Liggett & Myers Incorporated, is a corporation organized existing and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business located at 630 Fifth Avenue, in the City of New York, State of New York.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

I.

IT IS ORDERED that respondent Liggett & Myers Incorporated, a corporation, its successors and assigns and respondent's officers, agents, representatives and employees directly or through any corporation, subsidiary, division or other device, in connection with the offering for sale, sale or distribution of cigarettes in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from advertising any such cigarette unless respondent makes in all advertisements of such cigarette a clear and conspicuous disclosure of the statement prescribed in Section 4 of the Public Health Cigarette Smoking Act of 1969 (Public Law 91-222) which reads:

"Warning: The Surgeon General Has Determined That Cigarette Smoking Is Dangerous to Your Health."

A. For the purposes of this Order, the term "cigarette" shall mean (A) any roll of tobacco wrapped in paper or in any substance not containing tobacco, and (B) any roll of tobacco wrapped in any substance containing tobacco which, because of its appearance, the type of tobacco used in the filler, or its packaging and labeling, is likely to be offered to, or purchased by, consumers as a cigarette described in subparagraph (A).

B. For the purposes of this Order, the term "advertisement" shall mean all advertising in newspapers, magazines, and other periodicals published and distributed in the United States and other periodicals distributed primarily to members or units of the Armed Forces of the United States located abroad, and advertisements appearing on billboards placed or located within the United States and in other materials as specified in Sections D, E, and F.

C. For the purposes of this Order, the term "clear and conspicuous disclosure" shall mean that

1. The language of the warning statement shall be precisely as prescribed by Congress in Section 4 of the Public Health Cigarette Smoking Act of 1969.

2. The warning statement shall be set in two horizontal lines parallel with the base of the advertisement, separated by leading equivalent to the lower case "x-height", excluding the ascending and descending letters, of the particular type size. In any case where the width of an advertisement in any printed medium is too narrow because of the columnar format, the warning statement may appear in three lines provided there is full compliance with all other requirements in this definition.

3. The warning statement in newspaper, magazine, and other periodical advertisements shall appear in Univers 47 (Fdy) type style. The type size to be employed shall be the following:

10-point type.....in newspaper, magazine, and other periodical advertisements of a trim size not larger than 65 square inches.

12-point type..... .....in newspaper, magazine, and other periodical advertisements of a trim size larger than 65 square inches but not larger than 110 square inches.

14-point type.....in newspaper, magazine, and other periodical advertisements of a trim size larger than 110 square inches but not larger than 180 square inches.

16-point type.....in newspaper, magazine, and other periodical advertisements of a trim size larger than 180 square inches.

A double full-page or a multiple full-page advertisement in any non-tabloid newspaper shall contain a separate warning statement in 16-point type on each page. A double full-page or multiple full-page advertisement in any tabloid newspaper, magazine or other periodical shall not be required to contain more than one warning statement but the type size requirement shall be determined by the total aggregated size of the entire advertisement.

An advertisement which occupies one full page and part of another page in any newspaper, magazine or other periodical shall not be required to contain more than one warning statement, but the type size requirement shall be determined by the total aggregated size of the entire advertisement, and the warning statement shall appear on the full page on which the advertisement appears. An advertisement which occupies part of each of two or more pages in any newspaper, magazine or other periodical shall not be required to contain more than one warning statement, but the type size requirement shall be determined by the total aggregated size of the entire advertisement, and the warning statement shall appear on that page which contains the greater (or greatest) part of the advertisement.

4. Every warning statement shall be set in a ruled rectangle. The size of the rectangle shall be determined by providing at both ends and at both top and bottom a space between the type block and the enclosing rule not less than the following spaces: where 10-point type is used in the warning statement, the rule shall be 8-points away from the type block; where 12-point type is used in the warning statement, the rule shall be 10-points away from the type block; where 14-point type is used in the warning statement, the rule shall be 12-points away from the type block; and where 16-point type is used in the warning statement, the rule shall be 14-points away from the type block. The width of the rule enclosing the rectangle shall be 1/4-point where 10-point type is used in the warning statement; 1/2-point where 12-point type is used in the warning statement; 3/4-point where 14-point type is used in the warning statement; and 1-point where 16-point type is used in the warning statement.

5. The warning statement shall be printed in black against a solid white background within the rectangle, and the enclosing rule shall be printed in black.

6. The warning statement in its rectangle in any newspaper, magazine, or other periodical advertisement shall be a separate element in each advertisement and shall not contain or include any part of any picture, design, illustration or text within the advertisement. The warning statement in its rectangle shall not be contained or included as an integral part of any specific pictorial design or illustration; in particular, it shall not be made a constituent part of a reproduction of the package of cigarettes. The warning statement in its rectangle may be printed or superimposed upon any pictorial background portion of any advertisement.

7. The warning statement in its rectangle in any newspaper, magazine, or other periodical advertisement may be positioned anywhere within the trim area of the advertisement, but shall not be positioned in the margin of any advertisement. The rectangle shall not be positioned immediately next to, or immediately contiguous to, any rectangular designs, elements, or similar geometric forms (other than a picture of the cigarette package) or immediately contiguous to any textual matter appearing in the advertisement.

8. Blurring or illegibility of the warning statement in its rectangle occurring for reasons beyond the control of the respondent shall not be in violation of this Order.

D. On billboards of a size 24-sheets and larger, the type size of the warning statement shall be not less than 2 inches in height, and the rectangle and the enclosing rule shall be of a size, shape, contrast, and placement, proportionately corresponding to those specified in Subsections C-1, -2, -4, -5, -6, and -7 for newspaper, magazine, and other periodical advertisements of a trim size larger than 180 square inches. On billboards of a size 6-, 7-, and 8-sheets the type size shall be not less than 3/4 inches, on those of a size 2- through 5-sheets the type size shall be not less than 1/2 inch, and the rectangle and the enclosing rule shall be of a size, shape, contrast and placement, proportionately corresponding to those specified in Subsections C-1, -2, -4, -5, -6, and -7 for newspaper, magazine, and other periodical advertisements of a trim size larger than 180 square inches. On 1-sheet billboards the type size shall be not less than 24-points, and the rectangle and the enclosing rule shall be of a size, shape, contrast and placement, proportionately corresponding to those specified in Subsections C-1, -2, -4, -5, -6 and -7 for newspaper, magazine, and other periodical advertisements of a trim size larger than 180 square inches. On all public transit side cards of any shape the type size shall be not less than 18-points, and the rectangle and the enclosing rule shall be of a size, shape, contrast and placement, proportionately corresponding to those specified in Subsections C-1, -2, -4, -5, -6, and -7 for newspaper, magazine, and other periodical advertisements of a trim size larger than 180 square inches. All public transit end cards shall comply with the minimum requirements for 1-sheet billboards. The type style on any billboard or transit card shall be Univers 47 (Fdy) or a similar font.

E. On all point-of-sale promotional materials exhibited to cigarette purchasers, which have a surface containing an advertising display area of more than 36 square inches, the warning statement within its rectangle shall be included in a type size proportional to the type size specified in the nearest page size category for newspaper, magazine, and other periodical advertisements, as specified in Subsections C-1, -2, -3, -4, -5, -6, and -7. In determining the size of the advertising display area in point-of-sale promotional materials consisting of two or more pages, the total advertising display area of each page on which any printed or graphic material appears shall be aggregated, and where the aggregate of the advertising display area, on which any printed or graphic material appears, exceeds 36 square inches, the warning statement within its rectangle shall be placed on one of those pages and proportionalized to the size of that page in accordance with Section C. The warning statement shall not be required on any non-media advertising and promotional materials offered or given to consumers; nor shall the warning statement be required on any promotional materials which are not for public display or public consumer exposure, and are distributed to cigarette wholesalers, dealers, and merchants.

F. All advertising contained in non-point-of-sale leaflets, direct-mail circulars, paperback book inserts, and programs shall contain the warning statement within its rectangle in a type size proportional to the type size specified in the nearest page size category for newspaper, magazine, and other periodical advertisements, as specified in Subsections C-1, -2, -3, -4, -5, -6, and -7.

G. Sections C, D, E, and F of this Order shall become effective sixty (60) days after it is finally issued, but to meet the general and ordinary deadlines for submission of advertising copy established by the medium by or in which the advertisement is to appear, the requirements of Sections C, D, E, and F shall not be applicable (a) to newspaper, magazine, or other periodical advertising for which the closing date on which an advertiser must, according to the regular schedule of that newspaper, magazine, or other periodical, deliver the advertising material in final form to the printer, to the publisher, or as to spectacolor-type, to the production house, is less than forty-five (45) days after the date on which this Order shall become effective; (b) to advertising appearing on billboards for which copy must, according to the earliest practical date for replacement, be delivered in final form to the printer or painted or assembled on such billboards less than forty five (45) days after the date on which this Order shall become effective, but in any event, as to advertising appearing on billboards Sections C, D, E, and F

shall become applicable one hundred eighty (180) days from the date this Order shall become effective; (c) to advertising printed on non-point-of-sale leaflets, direct-mail circulars, paperback book inserts, and programs which is delivered in final form to the printer less than forty-five (45) days after the date on which this Order shall become effective, but in any event, as to advertising printed on non-point-of-sale leaflets, direct-mail circulars, paperback book inserts, and programs, Sections C, D, E, and F shall become applicable one hundred forty (140) days from the date this Order shall become effective; or (d) to point-of-sale promotional materials exhibited to cigarette purchasers, which have a surface containing an advertising display area of more than 36 square inches, delivered in final form to the printer less than forty-five (45) days from the date this Order shall become effective.

H. This Order shall not be applicable to signs on factories, plants, warehouses, and other facilities related to the manufacture or factory storage of cigarettes, to corporate or financial reports, or to employment advertising, or to advertising in tobacco trade publications not circulated to consumers.

II.

IT IS FURTHER ORDERED that the respondent corporation shall forthwith distribute a copy of this order to each of its operating divisions or departments.

IT IS FURTHER ORDERED that respondent notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order.

IT IS FURTHER ORDERED that respondent shall, within sixty (60) days after service upon it of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with the order to cease and desist.

By the Commission; Commissioner Jones' statement is attached.

S E A L

Charles A. Tobin,
Secretary.

ISSUED: March 30, 1972.

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EXHIBIT B--COMMISSION'S LETTER AUGUST 1, 1975
ANNEXED TO VERIFIED COMPLAINT OF
LIGGETT & MYERS INCORPORATED

FEDERAL TRADE COMMISSION
WASHINGTON, D. C. 20580

FFICE OF THE SECRETARY

RECEIVED
AUG 4 1975
LAW DEPARTMENT

Liggett and Myers Incorporated
4100 Roxboro Road
Durham, North Carolina 27704

Attention: Joseph Greer, Esquire
Associate General Counsel

Re: Liggett and Myers Incorporated
Docket No. C-2185

Dear Mr. Greer:

The Federal Trade Commission has determined that Liggett and Myers Incorporated has violated the above-captioned order by failing in certain cigarette advertisements to disclose the required health warning and by failing in other cigarette advertisements to disclose the health warning in the clear and conspicuous manner that is required by the order.

The Commission will, therefore, pursuant to the provisions of 15 U.S.C. 56(a)(1), notify the Attorney General of its intention to commence for these violations an action for civil penalties and other relief. For certain other violations of the order, the Commission will hold a civil penalty action in abeyance for 180 days. If, however, at the expiration of that period, Liggett and Myers Incorporated has not corrected these other violations, the Commission will seek civil penalties and other relief for them as well.

The Commission will immediately notify the Department of Justice of its intention to file a complaint for the following violations of the order:

1) The advertisement of cigarettes on display panels inserted since July 1972 into vending machines which fail to disclose the required health warning in violation of Section I-E of the order.

2) The advertisement of cigarettes on other promotional materials exhibited to the public since July, 1972, such as counter racks, nostalgia posters and almanac covers which fail to disclose the health warning or which disclose the health warning in a type size smaller than that required for the entire advertising display area in violation of Section I-E or I-F of the order.

3) The advertisement of cigarettes in newspapers, magazines or other periodicals published and distributed in the United States since July, 1972, which violate Section I-C of the order

a) by appearing to the public with a disclosure of the health warning in a type style or type size smaller than that required for the advertisement's trim size; or

b) by setting the warning statement in more than two or three lines; or

c) by positioning the warning rectangle immediately next to, or immediately contiguous to, other rectangular designs, elements or similar geometric forms, as was the case with the "Lark's 4 Sweepstakes" advertisement; or

d) by making the health warning a constituent part of a reproduction of the package of cigarettes.

The Commission has also determined that Liggett and Myers Incorporated has failed to disclose the health warning on billboard and transit card advertisements clearly and conspicuously as required by the order. Section I-D of the order specifies minimum type sizes for different sizes of billboards and transit cards. Compliance with that

provision, however, does not satisfy the overriding requirement established by the order that in these media the disclosure must be clear and conspicuous. Disclosures which conform to the minimum size provisions of Section I-D but which nonetheless are not of sufficient size for the warning to be read by those who view the advertisement cannot be deemed to comply with the order.

Moreover, the Commission has also determined that the typographic composition of the health warning utilized by your company violates Sections I-C-2 and I-C-4 of the order by measuring the requisite leading and spacing distances from the type faces and not from the type shoulders.

The Commission will not, however, immediately initiate a civil penalty action regarding violations pertaining to the size of the warning on billboards and transit cards or pertaining to the typographic requirements for the leading and spacing of the warning if those violations are remedied within 180 days from receipt of this order.

The Commission received and carefully considered your company's Statement of Position prior to making its determination in this matter.

By direction of the Commission.

Charles A. Tobin
Secretary

cc: H. Thomas Austern, Esquire
c/o Covington & Burling
888 - 16th Street, N. W.
Washington, D. C. 20006

Horace R. Kornegay, Esquire
c/o The Tobacco Institute, Inc.
1776 K Street, N. W.
Washington, D. C. 20006

A 188

ORDER TO SHOW CAUSE OF BROWN & WILLIAMSON TOBACCO CORPORATION

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

BROWN & WILLIAMSON TOBACCO CORPORATION,

Plaintiff,

-against-

LEWIS A. ENGMAN, Chairman, Federal Trade Commission, et al.,

Defendants.

75 Civ. 1047
JUDGE TENNEY

ORDER TO SHOW CAUSE FOR PRELIMINARY INJUNCTION

----------x

Upon the verified complaint for declaratory judgment and injunctive relief and the annexed affidavit of Martin London, sworn to August 14, 1975, it is hereby

ORDERED, that the defendants SHOW CAUSE, in the United States District Court, Room 130 5, Foley Square, New York, New York, on August ~~21,~~ 25 1975, at ~~10:00 A.M.~~ 2 P.M., or as soon thereafter as counsel can be heard, why an order should not be entered, pursuant to Rule 65, Federal Rules of Civil Procedure:

CMT USDJ

1. Staying, pending final judgment, the accumulation of penalties under Section 5 of the Federal Trade Commission Act, 15 U.S.C. Section 45, for alleged violations of the order a copy of which is attached to the verified complaint herein as Exhibit A, and

2. Granting to plaintiff such other and further relief as the Court may deem proper;

and it is further

ORDERED, that service of a copy of this O der and of the papers upon which it is granted on the said defendants shall be sufficient if made on or before August 19, 1975, as follows:

CHT/USDJ

(a) Upon defendants LEWIS A. ENGMAN, PAUL RAND DIXON, MAYO J. THOMPSON, M. ELIZABETH HANFORD and STEPHEN NYE, by certified mail addressed to each of them at the Federal Trade Commission Building, Pennsylvania Avenue at Sixth Street, N.W., Washington, D. C. 20580;

(b) Upon the FEDERAL TRADE COMMISSION, by personal delivery to such agency, Washington, D.C.; and

(c) Upon EDWARD H. LEVI, and the UNITED STATES OF AMERICA by serving the United States in accordance with Rule 4(d)(4) of the Federal Rules of Civil Procedure, provided that personal delivery thereof shall be made to the United States Attorney for this District.

Dated: ~~Issued at~~ M.
August 15, 1975
New York, New York
At 12:10 PM.

S/ Charles H Tenney
U.S.D.J.

CHT/USDJ

AFFIDAVIT OF MARTIN LONDON

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

BROWN & WILLIAMSON TOBACCO CORPORATION,

Plaintiff,

-against-

LEWIS A. ENGMAN, Chairman, Federal Trade Commission, et al.,

Defendants.

75 Civ.

AFFIDAVIT

----------x

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

MARTIN LONDON, being sworn, says:

1. I am a member of the firm of Paul, Weiss, Rifkind, Wharton & Garrison, attorneys in this action for the plaintiff, Brown & Williamson Tobacco Corporation. I make this affidavit in support of plaintiff's motion for an Order, pursuant to Rule 65 of the Federal Rules of Civil Procedure, staying, pending final judgment, the accumulation of penalties under Section 5 of the Federal Trade Commission, 15 U.S.C. Section 45, for alleged violations of the Order a copy of which is annexed to the Verified Complaint herein as Exhibit A.

2. This motion is brought on by an order to show cause rather than by notice of motion in order to minimize the delay in the hearing and determination of this motion which

seeks to stay the accumulation of penalties possibly amounting to thousands of dollars a day.

3. No application for this relief has heretofore been made to this or any other court.

Martin London

Sworn to before me this
14th day of August, 1975.

Notary Public

JEAN M. TROTTA
Notary Public, State of New York
No. 41-4605726
Qualified in Queens County

A 192

ORDER TO SHOW CAUSE OF PHILIP MORRIS INCORPORATED

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

PHILIP MORRIS INCORPORATED,	:	Civil Action File No. 75 Civ. 4042 KTD
Plaintiff,	:	
-against-	:	ORDER TO SHOW CAUSE
LEWIS A. ENGMAN, Chairman, Federal Trade Commission, et al.,	:	FOR PRELIMINARY INJUNCTION
Defendants.	:	

Upon the verified complaint for declaratory judgment and injunctive relief and the annexed affidavit of Donald Fried, sworn to August 14, 1975, it is hereby

ORDERED, that the defendants SHOW CAUSE, in the United States District Court, Room 1305, Foley Square, New York, New York, on August ~~21~~ 25, 1975, at ~~10:00 A.M.~~ 2:00 P.M., or as soon thereafter as counsel can be heard, why an order should not be entered, pursuant to Rule 65, Federal Rules of Civil Procedure:

1. Staying, pending final judgment, the accumulation of penalties under Section 5 of the Federal Trade Commission Act, 15 U.S.C. Section 45, for alleged violations of the order a copy of which is attached to the verified complaint herein as Exhibit A, and

2. Granting to plaintiff such other and further relief as the Court may deem proper;

and it is further

A 193

Order to Show Cause of Philip Morris Incorporated

ORDERED, that service of a copy of this Order and of the papers upon which it is granted on the said defendants shall be sufficient if made on or before August 19, 1975, as follows:

(a) Upon defendants LEWIS A. ENGMAN, PAUL RAND DIXON, MAYO J. THOMPSON, M. ELIZABETH HANFORD and STEPHEN NYE, by certified mail addressed to each of them at the Federal Trade Commission Building, Pennsylvania Avenue at Sixth Street, N.W., Washington, D. C. 20580;

(b) Upon the FEDERAL TRADE COMMISSION, by personal delivery to such agency, Washington, D. C.;

and

(c) Upon EDWARD H. LEVI and the UNITED STATES OF AMERICA by serving the United States in accordance with Rule 4(d)(4) of the Federal Rules of Civil Procedure, provided that personal delivery thereof shall be made to the United States Attorney for this District.

CHARLES E. STEWART
U.S.D.J.

DATED
~~Issued~~ at
August 15, 1975
New York, New York
12:50 P.M.

AFFIDAVIT OF DONALD FRIED

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

PHILIP MORRIS INCORPORATED,	:	Civil Action File No. 75 Civ.
Plaintiff,	:	
-against-	:	AFFIDAVIT
LEWIS A. ENGMAN, Chairman, Federal Trade Commission, et al.,	:	
Defendants.	:	

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

DONALD FRIED, being sworn, says:

1. I am a member of the firm of CONBOY, HEWITT, O'BRIEN & BOARDMAN, attorneys in this action for the plaintiff, Philip Morris Incorporated. I make this affidavit in support of plaintiff's motion for an Order, pursuant to Rule 65 of the Federal Rules of Civil Procedure, staying, pending final judgment, the accumulation of penalties under Section 5 of the Federal Trade Commission, 15 U.S.C. Section 45, for alleged violations of the Order a copy of which is annexed to the verified complaint herein as Exhibit A.

2. This motion is brought on by an order to show cause rather than by notice of motion in order to minimize the delay in the hearing and determination of this motion which

seeks to stay the accumulation of penalties possibly amounting to thousands of dollars a day.

3. No application for this relief has heretofore been made to this or any other court.

Donald Fried

Sworn to before me this

14th day of August, 1975.

VIRGINIA F. BARWITZ
Notary Public, State of New York
No. 30-0126525
Qualified in Nassau County
Certificate filed in New York County
Commission Expires March 30, 1977

A 196

ORDER TO SHOW CAUSE OF R. J. REYNOLDS TOBACCO COMPANY

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

- x

R. J. REYNOLDS TOBACCO COMPANY, : 75 Civ. 4249 (KTD)

Plaintiff, :

-against- : ORDER TO SHOW CAUSE

LEWIS A. ENGMAN, et al., : FOR Preliminary Injunction

Defendants. :

- x

Upon the verified complaint for declaratory judgment and injunctive relief and the annexed affidavit of James W. B. Benkard, sworn to August 15, 1975, it is hereby

ORDERED, that the defendants SHOW CAUSE, in the United States District Court, Room 1305, Foley Square, New York, New York, on August ~~21~~ 25, 1975, at ~~10:00 A.M.~~ 2:00 PM, or as soon thereafter as counsel can be heard, why an order should not be entered, pursuant to Rule 65, Federal Rules of Civil Procedure:

1. Staying, pending final judgment, the accumulation of penalties under Section 5 of the Federal Trade Commission Act, 15 U.S.C. Section 45, for alleged violations of the order a copy of which is attached to the verified complaint herein as Exhibit A; and

2. Granting to plaintiff such other

and further relief as the Court may deem proper;

and it is further

ORDERED, that service of a copy of this Order and of the papers upon which it is granted on the said defendants shall be sufficient if made on or before August , 1975, as follows:

(a) Upon defendants LEWIS A. ENGMAN, PAUL RAND DIXON, MAYO J. THOMPSON, M. ELIZABETH HANFORD and STEPHEN NYE, by certified mail addressed to each of them at the Federal Trade Commission Building, Pennsylvania Avenue at Sixth Street, N.W., Washington, D. C. 20580;

(b) Upon the FEDERAL TRADE COMMISSION by personal delivery to such agency, Washington, D.C.; and

(c) Upon EDWARD H. LEVI, and the UNITED STATES OF AMERICA by serving the United States in accordance with Rule 4(d)(4) of the Federal Rules of Civil Procedure, provided that personal delivery thereof shall be made to the United States Attorney for this District.

/s/ Charles E. Stewart Jr
U.S.D.J.

~~Issued at~~ Dated ~~M.~~
August 15, 1975
New York, New York

A 198

AFFIDAVIT OF JAMES W. B. BENKARD

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

- x

R. J. REYNOLDS TOBACCO COMPANY, : 75 Civ. 4049

Plaintiff, :

-against- : AFFIDAVIT

LEWIS A. ENGMAN, et al., :

Defendants.:

- x

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

JAMES W. B. BENKARD, being sworn, says:

1. I am a member of the firm of Davis Polk & Wardwell, attorneys in this action for the plaintiff, R. J. Reynolds Tobacco Company. I make this affidavit in support of plaintiff's motion for an Order, pursuant to Rule 65 of the Federal Rules of Civil Procedure, staying, pending final judgment, the accumulation of penalties under Section 5 of the Federal Trade Commission Act, 15 U.S.C. Section 45, for alleged violations of the Order a copy of which is annexed to the Verified Complaint herein as Exhibit A.

2. This motion is brought on by an order to show cause rather than by notice of motion in order to minimize the delay in the hearing and determination of

this motion which seeks to stay the accumulation of penalties possibly amounting to thousands of dollars a day.

3. No application for this relief has heretofore been made to this or any other court.

/s/ James W.B. Benkard
James W. B. Benkard

Sworn to before me this
day of August, 1975.

/s/ William J. Lind
Notary Public

A 200

ORDER TO SHOW CAUSE OF LOEW'S THEATRES, INC.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

LOEW'S THEATRES, INC.,

Plaintiff,

-against-

LEWIS A. ENGMAN, Chairman, Federal Trade Commission, et al.,

Defendants.

75 Civ. 4050 (CBM)

ORDER TO SHOW CAUSE

For Preliminary Injunction

Upon the verified complaint for declaratory judgment and injunctive relief and the annexed affidavit of Joseph W. Gelb, sworn to August 14, 1975, it is hereby

ORDERED, that the defendants SHOW CAUSE, in the United States District Court, Room 705, Foley Square, New York, New York, on August ~~21~~ 25, 1975, at 10:00 A.M., or as soon thereafter as counsel can be heard, why an Order should not be entered, pursuant to Rule 65, Federal Rules of Civil Procedure:

1. Staying, pending final judgment, the accumulation of penalties under Section 5 of the Federal Trade Commission Act, 15 U.S.C. §45, for alleged violations of a Federal Trade Commission Consent Order, a copy of which is attached to the verified complaint herein as Exhibit A, and

2. Granting to plaintiff such other and further relief as the Court may deem proper;

and it is further

ORDERED, that service of a copy of this Order and of the papers upon which it is granted on the said defendants shall be sufficient if made on or before August 19, 1975, as follows:

(a) Upon defendants LEWIS A. ENGMAN, PAUL RAND DIXON, MAYO J. THOMPSON, M. ELIZABETH HANFORD and STEPHEN NYE, by certified mail addressed to each of them at the Federal Trade Commission Building, Pennsylvania Avenue at Sixth Street, N.W., Washington, D. C. 20580;

(b) Upon the FEDERAL TRADE COMMISSION, by personal delivery to such agency, Washington, D. C.; and

(c) Upon EDWARD H. LEVI, and the UNITED STATES OF AMERICA by serving the United States in accordance with Rule 4(d)(4) of the Federal Rules of Civil Procedure, provided that personal delivery thereof shall be made to the United States Attorney for this District.

/s/ Constance Baker Motley
U.S.D.J.

dated
~~Issued at~~
August 15, 1975 ~~M.~~ time: 4:00 p.m.
New York, New York

AFFIDAVIT OF JOSEPH W. GELB

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

LOEW'S THEATRES, INC.,

Plaintiff,

-against-

LEWIS A. ENGMAN, Chairman, Federal Trade Commission, et al.,

Defendants.

75 Civ. 4050 (CBM)

AFFIDAVIT IN SUPPORT OF APPLICATION FOR ORDER TO SHOW CAUSE

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

Joseph W. Gelb, being duly sworn, deposes and says:

1. I am a member of the firm of Weil, Gotshal & Manges, attorneys for plaintiff Loew's Theatres, Inc. ("Loew's"). I make this affidavit in support of plaintiff's motion for an order staying, pending final judgment, the accumulation of penalties under §5 of the Federal Trade Commission Act, 15 U.S.C. §45, for alleged violations of a Federal Trade Commission Consent Order, dated March 30, 1972, a copy of which is annexed to the verified complaint herein as Exhibit A.

2. The Federal Trade Commission ("Commission") on August 1, 1975 informed Loew's it has determined that certain

of its cigarette advertising and promotional materials are in violation of that Consent Order.

3. Loew's brings on this application, by order to show cause, rather than notice of motion, in order to gain a speedy hearing since it is subject each day to a claim for additional penalties possibly amounting to thousands of dollars a day. It is therefore necessary that Loew's application be heard promptly.

4. No previous application for this relief has been heretofore made.

JOSEPH W. GELB

Sworn to before me this
14 day of August, 1975.

Notary Public

ARTHUR J. STEVENS
Notary Public, State of New York
No. 60-9186960 Qualified in Westchester Co.
Certificate filed in New York County
Commission Expires March 30, 19...

A 204

ORDER TO SHOW CAUSE OF AMERICAN BRANDS, INC.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

FILED 8/19/75
By
Per

- -x

AMERICAN BRANDS, INC.,

Plaintiff,

-against-

FEDERAL TRADE COMMISSION;
LEWIS A. ENGMAN, Chairman, Federal Trade Commission;
PAUL RAND DIXON,
MAYO J. THOMPSON,
M. ELIZABETH HANFORD, and
STEPHEN NYE, Members, Federal Trade Commission;
EDWARD H. LEVI, Attorney General of the United States; and
UNITED STATES OF AMERICA,

Defendants.

- -x

75 Civ. 4051(CLB)

ORDER TO SHOW CAUSE

Upon the Verified Complaint for declaratory judgment and injunctive relief and the annexed affidavit of Daniel J. O'Neill, sworn to August 15, 1975, it is hereby

ORDERED, that the defendants SHOW CAUSE, in the United States District Court, Room 506, Foley Square, New York, New York, on August ~~21~~ 25, 1975, at 10:00 A.M., or as soon thereafter as counsel can be heard, why an order should not be entered, pursuant to Rule 65, Federal Rules of Civil Procedure:

1. Staying, pending final judgment, the accumulation of penalties under Section 5

of the Federal Trade Commission Act, 15 U.S.C. § 45, for alleged violations of the Consent Order, a copy of which is attached to the Verified Complaint herein as Exhibit B, and

2. Granting to plaintiff such other and further relief as the Court may deem proper;

and it is further

ORDERED, that service of a copy of this Order and of the papers upon which it is granted on the said defendants shall be sufficient if made on or before August 19, 1975, as follows:

(a) Upon defendants LEWIS A. ENGMAN, PAUL RAND DIXON, MAYO J. THOMPSON, M. ELIZABETH HANFORD and STEPHEN NYE, by certified mail addressed to each of them at the Federal Trade Commission Building, Pennsylvania Avenue at Sixth Street, N.W., Washington, D.C. 20580;

(b) Upon the FEDERAL TRADE COMMISSION, by personal delivery to such agency, Washington, D.C.; and

(c) Upon EDWARD H. LEVI, and the UNITED STATES OF AMERICA by serving the United States in accordance with Rule 4(d)(4) of the Federal Rules of Civil Procedure, provided

that personal delivery thereof shall be made to the United States Attorney for this District.

S/C E. STEWART
U. S. D. J.

DATED

Issued at ~~M.~~
August 15, 1975
New York, New York

AFFIDAVIT OF DANIEL J. O'NEILL

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- -x

AMERICAN BRANDS, INC.,

Plaintiff,

-against-

FEDERAL TRADE COMMISSION;
LEWIS A. ENGMAN, Chairman, Federal Trade Commission;
PAUL RAND DIXON,
MAYO J. THOMPSON,
M. ELIZABETH HANFORD, and
STEPHEN NYE, Members, Federal Trade Commission;
EDWARD H. LEVI, Attorney General of the United States; and
UNITED STATES OF AMERICA,

Defendants.

75 Civ. 4082

AFFIDAVIT

- -x

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

DANIEL J. O'NEILL, being duly sworn, deposes and says:

1. I am a member of the firm of Chadbourne, Parke, Whiteside & Wolff, attorneys for the plaintiff American Brands, Inc. I make this affidavit in support of plaintiff's motion for an Order, pursuant to Rule 65 of the Federal Rules of Civil Procedure, staying, pending final judgment, the accumulation of penalties under Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45,

for alleged violations of the Consent Order, a copy of which is annexed to the Verified Complaint herein as Exhibit B.

2. This motion is brought on by an order to show cause rather than by notice of motion in order to minimize the delay in the hearing and determination of this motion which seeks to stay the accumulation of penalties possibly amounting to thousands of dollars a day.

3. No application for this relief has heretofore been made to this or any other court.

Daniel J. O'Neill

Sworn to before me this
14 day of August, 1975.

Notary Public

LUCILLE S MILILLO
NOTARY PUBLIC, STATE OF NEW YORK
No. 24-4511503
Qualified in Kings County
Commission Expires March 30, 1977

VERIFIED COMPLAINT OF AMERICAN BRANDS, INC. ANNEXED TO AFFIDAVIT OF DANIEL J. O'NEILL

Identical to Verified Complaint of American Brands, Inc. printed herein at pages A104 to A122.

EXHIBITS A TO G ANNEXED TO VERIFIED COMPLAINT OF AMERICAN BRANDS, INC.

Identical to Exhibits A to G annexed to Verified Complaint of American Brands, Inc. printed herein at pages A123 to A166.

A 210

ORDER TO SHOW CAUSE OF LIGGETT & MYERS INCORPORATED

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

LIGGETT & MYERS INCORPORATED, Plaintiff, -against- LEWIS A. ENGMAN, Chairman, Federal Trade Commission, et al., Defendants.	75 Civ. 4052 (CLB) ORDER TO SHOW CAUSE For Preliminary Injunction

Upon the verified complaint for declaratory judgment and injunctive relief and the annexed affidavit of Grainger R. Barrett, sworn to August 15, 1975, it is hereby

ORDERED, that the defendants SHOW CAUSE, in the United States District Court, Room 506, Foley Square, New York, New York, on August ~~21~~ 25, 1975, at 10:00 A.M., or as soon thereafter as counsel can be heard, why an order should not be entered, pursuant to Rule 65, Federal Rules of Civil Procedure:

1. Staying, pending final judgment, the accumulation of penalties under Section 5 of the Federal Trade Commission Act, 15 U.S.C. Section 45, for alleged violations of the order, a copy of which is attached to the verified complaint herein as Exhibit A, and

2. Granting to plaintiff such other and further relief as the Court may deem proper; and it is further

ORDERED, that service of a copy of this Order and of the papers upon which it is granted on the said defendants shall be sufficient if made on or before August 19, 1975, as follows:

(a) Upon defendants LEWIS A. ENGMAN, PAUL RAND DIXON, MAYO J. THOMPSON, M. ELIZABETH HANFORD and STEPHEN NYE, by certified mail addressed to each of them at the Federal Trade Commission Building, Pennsylvania Avenue at Sixth Street, N.W., Washington, D.C. 20580;

(b) Upon the FEDERAL TRADE COMMISSION, by personal delivery to such agency, Washington, D.C.; and

(c) Upon EDWARD H. LEVI, and the UNITED STATES OF AMERICA by serving the United States in accordance with Rule 4(d)(4) of the Federal Rules of Civil Procedure, provided that personal delivery thereof shall be made to the United States Attorney for this District.

Dated
~~Issued at~~
August 15, 1975
New York, New York

M.

/s/ Charles Stewart
U.S.D.J.

AFFIDAVIT OF GRAINGER R. BARRETT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- x

LIGGETT & MYERS INCORPORATED,

Plaintiff,

-against-

LEWIS A. ENGMAN, Chairman, Federal Trade Commission, et al.,

Defendants.

- x

75 Civ. 4057 (CLB)

AFFIDAVIT

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

GRAINGER R. BARRETT, being sworn, says:

1. I am the attorney in this action for the plaintiff, Liggett & Myers Incorporated. I make this affidavit in support of plaintiff's motion for an Order, pursuant to Rule 65 of the Federal Rules of Civil Procedure, stay ing, pending final judgment, the accumulation of penalties under Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, for alleged violations of the Order, a copy of which is annexed to the Verified Complaint herein as Exhibit A.

2. This motion is brought on by an order to show cause rather than by notice of motion in order to minimize the delay in the hearing and determination of

this motion which seeks to stay the accumulation of penalties possibly amounting to thousands of dollars a day.

3. No application for this relief has heretofore been made to this or any other court.

Grainger R. Barrett

Sworn to before me this
15th day of August, 1975.

Alice C. Farnan
Notary Public

ALICE C. FARNAN
NOTARY PUBLIC, State of New York
No. 41-4523987
Qualified in Queens County
Cert. filed with New York Co. Clerk
Term Expires March 30, 1976

VERIFIED COMPLAINT OF LIGGETT & MYERS INCORPORATED
ANNEXED TO AFFIDAVIT OF GRAINGER R. BARRETT

Identical to Verified Complaint of Liggett & Myers Incorporated printed herein at pages A167 to 177.

EXHIBITS A AND B ANNEXED TO VERIFIED COMPLAINT OF
LIGGETT & MYERS INCORPORATED

Identical to Exhibits A and B annexed to Verified Complaint of Liggett & Myers Incorporated printed herein at pages A178 to A187.

DEFENDANTS' NOTICE OF MOTION

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- -x

BROWN AND WILLIAMSON TOBACCO CORP., PHILIP MORRIS, INC., R. J. REYNOLDS TOBACCO CO., LOEW'S THEATRES, INC., AMERICAN BRANDS, INC., and LIGGET AND MYERS, INC.,

Plaintiffs

- v -

LEWIS A. ENGMAN, PAUL RAND DIXON, MAYO J. THOMPSON, M. ELIZABETH HANFORD, STEPHEN NYE, FEDERAL TRADE COMMISSION and EDWARD H. LEVI,

Defendants.

- -x

NOTICE OF MOTION

75 Civ. 4047
75 Civ. 4048
75 Civ. 4049
75 Civ. 4050
75 Civ. 4051
75 Civ. 4052

S I R S :

PLEASE TAKE NOTICE, that upon the accompanying memorandum of law, the defendants, by their attorney Paul J. Curran, United States Attorney for the Southern District of New York, will move this Court on the 25th day of August, 1975, at 2:00 P.M., in Room 1305, in the United States Courthouse, Foley Square, New York, New York, for judgment

dismissing the captioned complaints pursuant to Rule 12(c) of the Federal Rules of Civil Procedure.

Dated: New York, New York
August 24, 1975

PAUL J. CURRAN
United States Attorney for the
Southern District of New York
Attorney for Defendants

By: Richard J. Weisberg
RICHARD J. WEISBERG
Assistant United States Attorney
Office & Post Office Address:
United States Courthouse Annex
1 St. Andrew's Plaza
New York, New York 10007
Telephone: (212) 791-1971

AFFIDAVIT OF ERIC M. RUBIN

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

- x

BROWN & WILLIAMSON TOBACCO CORPORATION,
Plaintiff,
v.
LEWIS A. ENGMAN, Chairman, Federal Trade Commission, et al.,
Defendants.
: 75 Civ. 4047

- x

PHILIP MORRIS INCORPORATED,
Plaintiff,
v.
LEWIS A. ENGMAN, Chairman, Federal Trade Commission, et al.,
Defendants.
: 75 Civ. 4048

- x

R.J. REYNOLDS TOBACCO COMPANY,
Plaintiff,
v.
LEWIS A. ENGMAN, Chairman, Federal Trade Commission, et al.,
Defendants.
: 75 Civ. 4049

- x

LOEW'S THEATRES, INC.,
Plaintiff,
v.
LEWIS A. ENGMAN, Chairman, Federal Trade Commission, et al.,
Defendants.
: 75 Civ. 4050

- x

AMERICAN BRANDS, INC.,
Plaintiff,
v.
FEDERAL TRADE COMMISSION, et al.,
Defendants.
: 75 Civ. 4051

- x

LIGGETT & MYERS INCORPORATED, Plaintiff,	)	
v.	)	75 Civ. 4052
LEWIS A. ENGMAN, Chairman, Federal Trade Commission, et al., Defendants.	)	

AFFIDAVIT

DISTRICT OF COLUMBIA)
) ss
CITY OF WASHINGTON)

ERIC M. RUBIN, being duly sworn, deposes and says:

1. I am an attorney in the Division of Compliance in the Bureau of Consumer Protection of the Federal Trade Commission (the "Commission"). I have been since January, 1975, the Assistant Bureau Director for Compliance with responsibilities for determining the manner and degree of compliance maintained by plaintiffs with six Commission orders issued by the Commission on March 30, 1972, under dockets C-2180 through C-2185. I submit this affidavit in opposition to plaintiffs' applications for a stay of accrual of penalties pendente lite. I make the following statements based on information and belief.

2. On January 11, 1964, the Surgeon General released the report on his Advisory Committee on Smoking and Health which determined that cigarette smoking presents a health hazard of such magnitude as to warrant appropriate government action. On January 22, 1964, the Commission published

in the Federal Register a notice that it intended to begin a trade regulation rule proceeding to require on all cigarette packages and in all cigarette advertisements the clear and conspicuous disclosure of a warning of the health hazards involved in cigarette smoking. On June 22, 1964, the Commission promulgated a trade regulation rule requiring such disclosures effective for packages on January 1, 1965, and for advertisements on July 1, 1965. At the request of the Chairman of the Committee on Foreign and Interstate Commerce of the House of Representatives, the Commission later postponed the effective date for packages until July 1, 1965.

3. In July 1965 Congress passed the Federal Cigarette Labeling and Advertising Act, P.L. 8992, 15 U.S.C. § 1331, which (1) required on all cigarette packages the clear and conspicuous disclosure of a particular health warning, (2) prohibited until July 1, 1969, the requiring in cigarette advertisements of any statement relating to smoking and health, and (3) required the Commission and the Secretary of Health, Education and Welfare to submit annually to the Congress reports on the effectiveness of the health warning in cigarette labeling, on current practices and methods of cigarette advertising, and on recommendations for legislation.

4. In the summer of 1969 the Commission announced its intention again to promulgate a trade regulation rule requiring in all cigarette advertising a clear and conspicuous disclosure of an explicit warning of the dangers to health involved in cigarette smoking. Congress, however, again intervened and

prohibited the Commission from taking "any action before July 1, 1971, with respect to its pending trade regulation rule proceeding relating to cigarette advertising," and it also required the Commission to give at least six months notice to the Congress before taking any action on or after July 1, 1971, with respect to such pending trade regulation rule. The Act stated that it was not intended to otherwise effect the authority of the Commission with respect to unfair or deceptive acts or practices in the advertising of cigarettes. P.L. 91-222, amending 15 U.S.C. § 1331 et seq.

5. In anticipation of the impending expiration of the Congressional prohibition on the Commission's proceeding further with a trade regulation rule concerning a required health warning in cigarette advertisements, four of the six plaintiffs began on or about April 15, 1971, to disclose in certain of their cigarette advertisements a depiction of their cigarette package showing the health warning that is printed on it. In June, 1971, the Commission notified the Congress of its intention to serve on plaintiffs proposed complaints charging them with a failure to disclose in all their cigarette advertisements a clear and conspicuous warning of the dangers to health determined by the Surgeon General to exist with cigarette smoking. On July 1, 1971, the Commission served on plaintiffs the proposed complaints and allowed a six month period within which its staff and plaintiffs might negotiate settlements.

6. From the outset of the negotiations, there was no serious contention as to whether there should be a health warning in cigarette advertisements, and there was nc serious contention over what should be the wording of a required warning. The only issue actually in dispute was how noticeable the warning must be. To that end there were intensive negotiations at the request of plaintiffs over the precise dimensions, layout, and color contrast necessary for disclosure of the warning. Negotiations with plaintiffs began in August, 1971, but immediately were stalemated over the size and color contrast necessary for the warning in periodical advertisements. Until the end of November, 1971, plaintiffs refused to agree to disclose in periodical advertisements a warning printed in a type size even so much as 1/36 of an inch larger than what they proposed. That stalemate ended, however, on December 1, 1971, when the Commission and plaintiffs agreed to use in periodical advertisements a slightly larger warning than what plaintiffs had earlier proposed. Thereafter, plaintiffs and the Commission's staff quickly negotiated the terms of consent order provisions to cover cigarette advertising in such other media as billboards, transit cards, and promotional materials. Agreements Containing Consent Orders were signed on January 21, 1972; and on January 31, 1972, the Commission provisionally accepted them and put them on the public record for comments. On March 30, 1972, the orders were formally issued, and on April 7, 1972, they were served on plaintiffs.

The orders became final and enforceable sixty days later. In April, 1972, the Compliance Division wrote each of the plaintiffs reminding them of their obligation to submit reports of compliance within sixty days after service of the Orders. The letters from the Compliance Division included specific instructions that the compliance reports "consist of a full statement showing the manner and form in which [plaintiffs] have complied with each particular provision of the Order[s]" and also instructions that the reports "include copies of all forms of current or proposed promotional items [and] advertisements."

7. The reports of compliance required by the orders were due on May 29, 1972, but while compiling these reports, in late April and early May, 1972, plaintiffs jointly decided to ask for an extension of the due date for the reports until September 1, 1972. The request for extension was granted by the Commission's staff. On or about September 1, 1972, plaintiffs submitted their reports of compliance and each of them included a number of cigarette advertisements as exhibits, but they did not include copies of many other cigarette advertisements. Moreover, these reports of compliance did not reveal that there were, in addition to the advertisements contained in the reports, other advertisements then in use. The reports of compliance included for periodical cigarette advertisements, virtually only what printers call "proofs" and not copies of the advertisements as they are

actually published and seen by consumers. The reports of compliance did not state that in most instances the warning, as seen by the public in newspaper advertisements, would not be as large as that appearing in the "proofs," a fact then known to officers, agents, or representatives of all the plaintiffs but not to the Commission's staff.

8. The Compliance Division reviewed these reports and recommended to the Commission that they be received and filed. In December, 1972, plaintiffs were notified by the Commission's Secretary that the compliance reports had been received and filed and that "on the assumption that the information submitted [in them] is accurate and complete, . . . no compliance action by the Commission is indicated at this time."

9. In its report to Congress dated December 31, 1972, the Commission announced that it had issued the six cease and desist orders against plaintiffs and stated that beginning in May, 1972, cigarette advertisements had appeared with the health warning disclosed according to the format of those orders, meaning that after that date the warning was no longer appearing as part of a package depiction.

10. In the next annual report to Congress issued January 23, 1974, the Commission paraphrased its earlier statement to Congress stating that "by October of 1972 almost all cigarette advertising published in this country was in compliance with the terms" of the Orders. In making this statement the Commission was simply continuing to act in good faith reliance on plaintiffs' 1972 reports of compliance.

11. In the summer and fall of 1973, the Commission's staff reported to the Commission that on billboard and in foreign language cigarette advertisements the health warning was not appearing clearly and conspicuously. In July, 1973, the Commission announced an Enforcement Policy Statement notifying plaintiffs that they would be liable for civil penalties for violating these Orders if thereafter they failed to disclose the health warning in their cigarette advertisements in the same language as is principally used in the advertisements. The Commission instructed the staff to report back promptly on plaintiffs' willingness to bring their advertisements into compliance. In October, 1973, plaintiffs notified the Commission's staff that they would comply with the Enforcement Policy Statement and that conversion to warning statements in foreign languages would be completed by about November 13, 1973. This fact was reported to the Commission in late October, 1973, and at the same time the Commission's staff informed the Commission that billboard cigarette advertisements were containing a health warning too small to be read by those who view the advertisements. On October 25, 1973, the Commission instructed the staff to report back on its efforts to secure a warning on billboards that was in compliance with the Orders.

12. In the weeks following the issuance of the December 31, 1973, report to Congress, the Commission's staff received information that numerous other cigarette advertisements

were not in compliance with the Orders. For the first time the Division of Compliance discovered that many point-of-sale cigarette promotional materials lacked the requisite health warning, that most newspaper cigarette advertisements disclosed a warning smaller than that required by the Orders for their trim sizes, and that foreign language cigarette advertisements continued to disclose the warning in a language other than that principally used in the advertisement or in an inaccurate translation.

13. In April and May, 1974, plaintiffs were notified by the compliance staff of these discoveries. In subsequent months, the staff also learned of other violations of the Orders and notified plaintiffs accordingly. Most of these other violations involved advertising practices either commenced by plaintiffs subsequent to their filing the reports of compliance or advertising practices by plaintiffs which were in use since before 1972 but which had never been mentioned in their reports of compliance.

14. A compliance investigation was conducted by the Division of Compliance and included a staff request that plaintiffs submit sample "tear sheets" of all their cigarette advertisements of certain sizes published in any periodicals since November 15, 1973; and also sample copies of all their promotional materials of any size exhibited to the public since the summer of 1972. Plaintiffs and their advertising agencies were also asked to submit copies of all memoranda,

correspondence, and other records directly or indirectly relating to the health warning, as well as copies of all their current contracts with vending machine operators. Plaintiffs were also asked for certain information about their advertising expenditures.

15. Despite repeated requests to plaintiffs for the above materials and information, not all of the requested data was furnished. Staff was often told by plaintiffs in the course of the investigation that all the requested advertisements had been submitted, but nonetheless learned that cigarette advertisements other than those submitted by plaintiffs were in fact being circulated by plaintiffs.

16. In November, 1974, plaintiffs began discussing with the Division of Compliance the prospects for a settlement of this matter. Settlement was, however, not reached (1) because plaintiffs would not submit all the requested materials, including copies of advertisements, that were still being withheld; (2) because plaintiffs would not agree to comply with some of the staff's interpretations of the Orders; and (3) because plaintiffs would not come forward with a full settlement offer, including a figure for penalties. Despite plaintiffs' allegations in their Complaint, the Commission's staff never set as a pre-condition to beginning settlement discussions a requirement that plaintiffs must agree to "a lump sum payment of about $6 million penalties."

17. In November and December of 1974 and in January,

1975, a number of conferences with plaintiffs were held, devoted almost exclusively to a careful and explicit exposition of the advertising practices and the particular advertisements which the staff regarded as being in violation of the Orders. The only time the staff has ever made any mention of dollar figures was in connection with its answering plaintiffs' often stated request for a staff estimation of their possible "exposure" to civil penalties. Plaintiffs were specifically told that it was not for the staff to suggest to them the settlement offer that they might make, least of all its dollar amount. In other words, settlement talks broke down because plaintiffs would not agree to abide by staff's interpretation of the Orders, and not because of any demand by staff that plaintiffs make any "lump sum payment" as a pre-condition to even having settlement discussions. In fact, it was the plaintiffs who set a pre-condition to beginning settlement talks. They stated that they would not proceed to negotiations until and unless the staff first agreed to plaintiffs' interpretations of several provisions of the Orders.

18. Towards the end of the compliance investigation, on March 17, 1975, plaintiffs submitted to the Commission a lengthy Statement of Position (1) which misrepresented that the staff had "refused to specify the particular advertisements of each respondent which . . . have violated the Order[s] in the past," (2) which misrepresented that the

staff had instead demanded that plaintiffs must put up a huge sum as penalties for past and unspecified violations as a pre-condition to further discussions, (3) which set forth in great detail plaintiffs' interpretations of the Orders' provisions, and (4) which asked the Commission to reject its staff's interpretations of the Orders or at least to "return [the matter] to the staff" for futher "discussions" with plaintiffs. On August 1, 1975, the Commission wrote plaintiffs letters in response to their Statement. One purpose of these August 1, 1975, letters, therefore, (especially that part of them that granted plaintiffs a six month grace period to cure some of their violations) was to give plaintiffs an opportunity then to come forward with a reasonable settlement proposal once they knew how the Commission and not just the staff interprets the Orders. As of this date the Commission has not yet notified the Attorney General of its intention to commence any actions for civil penalties against plaintiffs and therefore has not yet begun the period of consultation with the Department of Justice as required by Section 16(a)(1) of the Federal Trade Commission Act, 15 U.S.C. § 56(a)(1), before any action for civil penalties may be commenced.

Eric M. Rubin

ERIC M. RUBIN

[Sworn to August 22, 1795]

TRANSCRIPT OF HEARING BEFORE HON. CHARLES R. TENNEY

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

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BROWN & WILLIAMSON TOBACCO CORPORATION,
Plaintiff,
v.
LEWIS A. ENGMAN, Chairman, Federal Trade Commission, et al.,
Defendants.
: 75 Civ. 4047

- x

PHILIP MORRIS INCORPORATED,
Plaintiff,
v.
LEWIS A. ENGMAN, Chairman, Federal Trade Commission, et al.,
Defendants.
: 75 Civ. 4048

- x

R.J. REYNOLDS TOBACCO COMPANY,
Plaintiff,
v.
LEWIS A. ENGMAN, Chairman, Federal Trade Commission, et al.,
Defendants.
: 75 Civ. 4049

- x

LOEW'S THEATRES, INC.,
Plaintiff,
v.
LEWIS A. ENGMAN, Chairman, Federal Trade Commission, et al.,
Defendants.
: 75 Civ. 4050

- x

AMERICAN BRANDS, INC.,
Plaintiff,
v.
FEDERAL TRADE COMMISSION, et al.,
Defendants.
: 75 Civ. 4051

- x

August 25, 1975,
2:05 P.M.

Before: Hon. Charles R. Tenney,
District Judge.

Appearances:

PAUL, WEISS, RIFKIND, WHARTON & GARRISON, ESQS.,
Attorneys for Brown and Williamson Tobacco Corp.
By: Martin London, Esq.,
Lewis A. Kaplan, Esq.

ARNOLD & PORTER, ESQS.,
Attorneys for Philip Morris, Inc.
By: Abe Krash, Esq.
Leonard Becker, Esq.

CLIFFORD, WARNKE, GLASS, McILWAIN & FINNEY, ESQS.,
Attorneys for R.J. Reynolds Tobacco Co.
By: Paul C. Warnke, Esq.

WEIL GOTSHAL & MANGES, ESQS.,
Attorneys for Loew's Theatres, Inc.
By: Irving Scher, Esq.
Joseph W. Gelb, Esq.

CHADBOURNE, PARKE, WHITESIDE & WOLFF, ESQS.,
Attorneys for American Brands, Inc.
By: Daniel O'Neill, Esq.

PATTON BOGGS & BLOW, ESQS.,
Attorneys for Liggett & Myers, Inc.
By: Lanny J. Davis, Esq.

PAUL J. CURRAN, ESQ.,
United States Attorney, Southern District of New York,
For the Government,
By: Richard J. Weisberg, Esq., Assistant U.S. Attorney.

WILLIAM CERILLO, ESQ.
LAWRENCE S. BLUMBERG, ESQ.
TERRENCE J. BOYLE, ESQ.
For the Federal Trade Commission.

MR. WEISBERG: Your Honor, there are six cases here. The government would move to consolidate these cases pursuant to Rule 42A on the ground they present essentially identical questions of law.

THE COURT: Application is granted.

I think you better submit an order.

MR. LONDON: If it pleases the Court, my name is Martin London, from the firm of Paul, Weiss, Rifkind, Wharton & Garrison. If the Court pleases, I would move to admit three gentlemen who are not members of the Southern District Bar. They are on my right Mr. Lanny J. Davis of the firm of Patton Boggs & Blow, from the District of Columbia, a member of the bar of that district. To my left over here, Mr. Paul Warnke of Clifford, Warnke, Glass, McIlwain & Finney, a member of the bar of the District of Columbia, and Mr. Krash of the firm of Arnold & Porter, also a member of the bar of the District of Columbia.

THE COURT: They are admitted for the purpose of this litigation.

MR. LONDON: Thank you, your Honor.

Your Honor, the plaintiffs have consulted among themselves in an effort to avoid having too many of us address the issues. We have decided first Mr. Krash will speak on behalf of the plaintiffs.

MR. KRASH: May it please the Court, my name is Abr Krash. I am counsel for one of the plaintiff, Philip Morris. As Mr. London stated, we have conferred and it was suggested to me that I proceed first. Mr. O'Neill counsel for American Brands in this matter, and Mr. London, counsel for Brown & Williamson may wish to supplement my remarks. We have tried to organize our presentations to the Court so as to avoid burdening the Court with repetitious argument.

If the Court please, the matter pending before the Court this afternoon is a motion by the plaintiffs, an application by the plaintiffs for a stay in the accrual of penalties because of alleged violations of a Federal Trade Commission consent order. All motions are identical and with respect to this particular matter the position of the plaintiffs on this motion is the same. I would propose first, if the Court please, to describe briefly the background of the present controversies and then would like to discuss the considerations which in our view prompt, or should lead the Court to enter an order staying this action and putting this matter down promptly for trial.

The critical facts with respect to this application are not, and they cannot be in dispute.

THE COURT: I have read the papers.

MR. KRASH: Very good, your Honor. I will therefore be very brief in outlining the essential background because of your Honor's familiarity with the papers.

Very briefly, the situation is this: In March of '72 the Commission entered into six separate consent orders with each of the plaintiffs. The orders are all identical.

The subject of the orders is inclusion of a warning statement as to smoking and health in all advertising and promotional matters.

As your Honor will note from the consent orders, attached to our papers, the consent order -- I speak of it in the singular -- is an extremely detailed order. Its essential focus, if the Court please, is on the size, type

b3 size of warning notice. Generally speaking, the size which is prescribed by the order would vary, dependent upon the size of the advertising area covered. If there was a smaller magazine, the warning notice in the magazine would be so much smaller than a newspaper.

In addition to specifying the size of the warning notice, the consent order describes in great detail the type style to be used, the format to be used and it is a very detailed order as to the inclusion of the warning notice in advertising.

The consent order, which was announced in March of 1972 and became effective 90 days later, required the plaintiffs to include the warning statement in newspapers, magazines, and point of sale material, and pursuant to that order beginning in the spring of 1972, the warning statement was inserted in those various media. In the fall of 1972, each of the manufacturers sent a compliance report to the Commission, which is a standard practice. In connection with that, each submitted a sample of the advertising. The Commission did not notify us it had problems with the advertising or the promotion.

Then in December of 1972, and again the following year, the Commission sent a report to Congress which they are required to do by the terms of the Public Health Smoking Act and in those reports to Congress the Commission in describing what had taken place in this field said that its staff had seen the advertising and so far as it was aware, the advertising was in conformity with the consent orders.

As I say, that statement was made in the report to Congress in '72. The statement that the advertising was in conformity was made in '73.

I may say, your Honor, we are dealing here with a situation where the advertising, everyone can see it so

there can be no question of there being private things going on which might not be known to the Commission which might be true in some situations.

In April of '74, the Commission's compliance staff notified plaintiffs they were instituting an investigation as to whether the consent orders had been violated. As is usual, they sent us requests for documents and asked to interview people and we cooperated for many months in that investigation. We produced documents and witnesses were made voluntarily available without subpoena and the Commission staff carried forward its investigation.

On the 1st of August, three weeks ago, the Commission sent the companies a letter. And, we have attached that letter to each of the complaints. In substance, if your Honor please, what the letter said that the Commission has determined, has determined, and I emphasize those words, that the plaintiffs had violated the consent order and the letter stated, the Commission said it will immediately notify the Department of Justice of its intention to file a complaint with respect to certain alleged violations which were described in the letter.

With respect to three violations, billboards, transit cards and topography, the Commission said, we'll give you 180 days to --

THE COURT: They have not as yet notified.

MR. KRASH: No. But the Commission said, we're immediately going to notify the Attorney General, it is our intention to commence an action for civil penalties. That is what the letter said.

The letter warned, with respect to the, what I call, the three other violations, if we did not in 180 days come into compliance, they would take such actions as appropriate, presumably an action as to civil penalties as to those also.

This letter of August 1st, your Honor, is a formal notification to the plaintiffs that in the judgment of the Federal Trade Commission the plaintiffs have violated the consent order. This is not informal. It is a document as the last sentence states, that it is sent to the plaintiffs by direction of the Commission. It is a letter signed by the secretary and direction of the Commission this is a formal determination. That is what it recites on its face. The Commission has determined. There are no other administrative proceedings. This is the last step in the administrative proceeding.

THE COURT: You mean you couldn't sit down and talk with them about it?

MR. KRASH: We had discussion with them. The

problems are, Judge Tenney, the problem is that as soon as they send the letter to you, you are in formal notification they deem you in violation and penalties begin to run from that date. There has been some dispute which Judge Friendly discussed in the J.B. Williams case in the Court of Appeals as to whether or not penalties run before you get notice or only when you get notice but there can be no dispute once a Commission sends a formal determination, at that point at least you are on notice and you have to do something.

They sent us this notice and said they were going to immediately refer it to the Attorney General. They did not in this letter, if I may say, Judge Tenney, they didn't say, come in and talk to us about these violations and we still stay the accrual of penalties while you talk to us. What they said in this letter was, we are referring this letter immediately notifying the Department of Justice and it is our intention to begin and action for civil penalties.

That is not the language of someone who is asking you to come and talk. That is war talk. It is a statement to us, I think fairly speaking, we are going to sue you and look to your rights. That certainly is the way we concluded it.

Let me say, if the Court please, that this letter,

this is a determination -- that's what it is, a formal determination-- puts us in the dilemma which the Supreme Court, Justice Harlan described in the Abbott Laboratory case. On one hand we could acquiesce in the determination. That would mean we would have to revise millions of dollars in promotion. The court may notice the plaintiffs are among the largest advertisers in the country. We would have to change our advertising promotion.

THE COURT: Is the same statute involved in the Abbott Laboratory case?

MR. KRASH: No. That involved the Food and Drug Act. If I may say, there is no statute which requires a warning notice in advertising. In this case it involves the Federal Trade Commission Act.

THE COURT: The Abbott Laboratories can be distinguished from this case.

MR. KRASH: The point is as to Abbott Laboratories, as Justice Harlan pointed out, where you have a situation in which a party is placed in immediate jeopardy of penalties and where an issue is appropriate for adjudication, you can institute declaratory judgment.

Now, under this letter they said, acquiesce, and that's one alternative. But, we believe in good faith the advertising complies. In addition, it is not clear what steps

we should take which would satisfy the Commission on a great many of those issues because there are different disagreements between us as to what the order provides.

On the other hand, if we don't do what they demand, which is change the advertising, consider the alternative situation in which we now find ourselves, which is exactly the problem which confronted the plaintiff in Abbott Laboratories. The situation is that given this notification, we are now subject day to day, each day to penalties and penalties in large amounts. Under the consent order, the order provided that the companies would be subject for each violation to a penalty of $5,000 a day if they violated a consent order. That is $5,000 a day. The Federal Trade Commission in the brief it submitted to your Honor this morning, relies primarily on penalties on Section 5L of the Federal Trade Commission and under the statute the penalties for violating an FTC order is $10,000 a day and the statute provides in case of a continuing violation, each day shall be deemed a separate violation.

In the J.B. Williams case, decided by Judge Friendly about a year ago, the FTC took the position that each advertisement is a separate violation.

If your Honor please you are not called upon here to decide the difficult question of which standard would

apply if there is a violation.

My point is that we are talking about enormous penalties here. That is the risk of penalties to which the plaintiffs are exposed is tremendou s.

THE COURT: They are not irrevocably fixed.

MR. KRASH: No, they are not, but there is this problem: From the viewpoint of the plaintiff, the question is, you have to look at it from our advising them at this point, and consider this. They say, "What should we do?" We say that we have the consent order provision as to penalties, we know what the Commission contends or may contend and from our point of view the question is what is the risk, what is the exposure here and the exposure, the maximum would be, you would have to say it could be $5,000, $10,000 a day or even more. That is the exposure. We have no way of knowing what ultimate amount. The point is that the exposure is enormous, potentially.

In the St. Regis case the penalties were $55,000. In this case, $5,000 a day, six plaintiffs, we are talking about more than that. It is the risk we are exposed to, Judge. While we appreciate there may be all kinds of mitigating factors, a court may --

THE COURT: Good faith.

MR. KRASH: Absolutely, but the point is that the

risk we are exposed to --

THE COURT: The very action you are taking now might be considered as evidence of good faith, in trying to resolve the problem.

MR. KRASH: That is correct, your Honor.

In the meantime, let me say we have the problem of being exposed at the risk of these penalties.

Let me say, your Honor, we say not only does this case cover the same type of situation described in the Abbott Laboratories, but under the St. Regis case, both as decided by the Court of Appeals for this circuit and the Supreme Court, both courts said that where a plaintiff, faced with alleged violation of an FTC order confronts penalties, you don't have to stand by and wait for the penalties to keep running, but the court was very explicit in stating the plaintiff has the alternative, going to the court, filing a suit for declaratory judgment and asking for a stay of the penalties. In the St. Regis case, the plaintiff was found to have violated the order in the District Court, the Court of Appeals and the Supreme Court still granted a stay of penalty. The language is very clear, where you are faced with day to day penalties, the appropriate thing to do is not to stand by, but to ask a court for appropriate relief. Indeed, we were required in our judgment,

by the St. Regis holdings, immediately after when this letter got here, to take prompt steps if we were to protect ourselves against these penalties to institute the action we started.

If your Honor please, consider the following points: Number 1, the FTC in the letter it sent us said that we will immediately notify the Department of Justice of our intention to file a complaint.

In the affidavit which was filed here today, by the FTC, the last paragraph states "As of this date, the Commission has not yet notified the Attorney General of its intention to commence any action."

That is some three weeks later. Without debating the discrepancy between their saying they are immediately going to do it, I don't think that's a critical point. The point at issue is that we are in a position where we are standing by day by day as these penalties mount and it has not yet been referred and we do not know when it will be referred.

Under the Federal Trade Commission Act, they send this matter to the Attorney General who then has 45 days to decide whether he wishes for the Justice Department to bring the suit. If he determines against that, the Federal Trade Commission can bring the suit in its own name. I think

inadvertently, the defendants have conveyed the impression that the case would be --

THE COURT: What is the other one?

MR. KRASH: The FTC can bring the suit in its own name. The government has said they are going to sue. They may sue within 45 days and if the Justice Department decides not, determines to wait, it will go to the FTC and then they will sue. But they say in this letter we are going to sue you. The problem we confront is day by day we are exposed to these penalties.

THE COURT: Except in the area where there is this period of time.

MR. KRASH: Yes, as to that fairly put, Judge Tenney, although they don't say so, I would urge your Honor to say at leaste as to that, that is an invitation, that is an invitation to us as to those three issues to talk and it would be inequitable for them to invite us to talk and if we weren't able to agree to sue us for penalties. The Court would so conclude, and I would urge the Court to so conclude. As to the other issues, all of the other issues, they say we are going to sue you for penalties, civil penalties and there is no doubt about that. It is a matter of when and we are therefore in a situation where day by day we are subject to the penalties.

What does the Federal Trade Commission say, the arguments they make why your Honor should not grant us the stay? Well, in the first place they say when they sent us this letter, what they meant to do was to invite the plaintiffs to engage in discussions about settling. I may say, it's a rather astonishing letter if that's what it is intended. What it says is, we are going to sue you, and that's not --

THE COURT: Sometimes it happens that you get a letter from somebody saying, I'm referring this to my attorney.

MR. KRASH: That's right, Judge. But, let me say, your Honor, I hesitate to say speaking from my own experience and I think other counsel would concur, we have never seen a formal determination of this sort and it was quite clear that from everything we knew that this was really war talk.

Consider the position that puts us in. They say that if it is an invitation to talk, although it doesn't say that, but they did not say in the letter, "Come and talk, we will stay the penalties while you're talking. And, if we can't agree, then we can go ahead and litigate the matter, but we're not going to penalize you for talking to us."

But, they said, we are immediately going to sue

for penalties. That suggests we negotiate with a pistol at our heads.

What is the situation with respect to penalties. They can say later we didn't negotiate in good faith or why didn't you act under St. Regis. And, we are therefore put in that difficulty, that dilemma, if we go ahead and talk to them that we are subject, exposed to the penalties.

THE COURT: You mean by talking to them you are exposed to penalties?

MR. KRASH: No, unless the Court stays the penalties and the risk is the exposure. We are exposed to the risk in this order, in the order--

THE COURT: There is a difference between certainty and the risk, you know.

MR. KRASH: Yes, Judge, there is. But, let us look at it again. I urge you to look at it from the practical viewpoint of counsel advising the parties. This is an intensely practical matter. We are in a situation where we are trying to advise parties with millions of dollars of advertising and they are saying what should we do, and we had many months of discussion with the FTC which -- I don't want to get into an argument as to who said what, but it's fair to say we had been subject for demand paying large sums of money and we are in disagreement

as to what the order means.

If we aren't exposed at the present time in view of this determination, I think it clear we are exposed to the risk of it and it is that risk which we are exposed to.

At the conclusion of the proceeding, your Honor may say you did not violate the order or, I find there are very technical violations and then the penalties should be nominal, or you acted in good faith and there should be no penalties. But, we are exposed day to day.

T2 pm jhs

Now, what else do they say? They say, No. 2, they say that the St. Regis case is not controlling because of the distinction between discretionary and mandatory penalties. But I point out the whole problem is the exposure, the risk of it. That's the real problem.

THE COURT: I think I might, in your position, have followed the procedure you did as some evidence of good faith in trying to resolve a problem on behalf of a client. As to whether it's a matter that could be entertained by this Court and whether under the authority there is sufficient basis for the Court to grant a stay, I am not saying that necessarily you would be wasting your time in this court, because I assume the fact that you came into court would be some evidence of tood faith. I don't know. I don't know the background here enough. I am accepting what I see in the papers. As I say, I just read over the papers and haven't had a chance really to make any determination.

MR. KRASH: Let me address to the questions that your Honor has in his mind. No. 1, you say jurisdiction.

THE COURT: We always have these matters brought into the District Court and for people to assume we know more about these things than administrative bodies and the

like, we are always highly honored by that, but there are limits --

MR. KRASH: Let me --

THE COURT: -- to our expertise.

MR. KRASH: I understand the burdens that are being imposed on the Courts.

THE COURT: It't not necessarily a burden. It's a matter of expertise.

MR. KRASH: It's a question of does the Court have jurisdiction and it's a question of power. Let me just comment on that in terms of what the FTC says in its brief and what they rely on, which I think makes very clear the dilemma which we have here.

We say to your Honor that we have an actual controversy within the meaning of the Declaratory Judgments Act. There is a dispute between a plaintiff and the Federal Trade Commission as to the meaning and scope of this order.

THE COURT: But that doesn't necessarily confer jurisdiction.

MR. KRASH: It confers jurisdiction if there is an actual controversy and if we are exposed to the risk of penalties.

Under St. Regis, in the St. Regis case the

Court of Appeals and the Supreme Court were very explicit on what would be sufficient and also in Abbott Laboratories. In the St. Regis case the Supreme Court, Mr. Justice Clark, said after the entry of the notice of default by the Commission petitioner might have itself sought relief before the Section 10 forfeitures began to accrue instead of waiting for the Attorney General to sue for collection.

I would urge your Honor, if you have not had an opportunity, to re-examine what Justice Clark said in speaking for the Court there. He said in that situation they were subject to forfeitures for non-compliance with an order, he said you don't have to stand by and wait for for the penal ties to accrue, the plaintiff, you can go into court under the Declaratory Judgments Act and ask for a stay of the penalties. You do not have to wait, he said, for the Attorney General to sue you.

The only question is is there a bona fide dispute, that is, are there bona fide issue here. As to that, your Honor, let me speak to that point. I submit that on the face of it there are from the letter itself, and you don't have to look deeply into the facts here to see there is a bona fide dispute. Let me just take a minute or two and indicate what type of issues are raised, and I think that demonstrates the jurisdiction. Those issues are not

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presented for adjudication. The only question is are there bona fide issues here.

The consent order says explicitly that you have to have a warning notice on billboards of a certain size two inches high. The Commiss on's letter to us says that we have violated -- that is the letter which they sent to Philip Morris and similar letters to the other plaintiffs. It states that although your warning notice is two inches high, it's not clear and conspicuous.

THE COURT: This is one of the matters that they are held up on, isn't it?

MR. KRASH: The billboard one is held up, yes. They have said that for six months they will defer instituting an action on the billboard.

Let me indicate two types of issues that they will not defer and that they have said they are going to immediately sue us on. The consent order describes in great detail the different types of media on which the warning notice must appear. It speaks of magazines, newspapers, leaflets, it speaks of paperback books, billboards, so on. It doesn't say a word anywhere abut vending machines. It speaks of point of sale, but it says nothing about vending machines.

The FTC's letter to us, the very first paragraph

says "You have violated the order because on the vending machine you don't put the warning notice", and there is a question whether vending machines are covered by this order, and secondly, whether advertisements of the size we have are subject to the literal language of this order, and there is no question that that issue is on the table, that they have said they will sue us right away with respect to that.

Let me show you another type of issue which they have said they are going to sue us about and they have so stated in these letters. The consent order --

THE COURT: Who controls the vending machines?

MR. KRASH: They are controlled by the manufacturers who sell them to vending machine operators and the cigarette companies --

THE COURT: By manufacturerers are you talking about cigarette manufacturers?

MR. KRASH: No, cigarette manufacturers do not have any ownership or control of any vending machines at all. The vending machines are owned and operated by independent operators throughout the country. We contract with representatives of the manufacturers, each one of us separately, either for space in the machine -- and with the operators we contract we make separate contracts with

hs6

respect to the advertising.

THE COURT: So you could control the placing of signs on those vending machines.

MR. KRASH: Not a warning sign. They own them.

THE COURT: You don't have to sell them cigarettes.

MR. KRASH: We don't have to sell them cigarettes, that's true.

THE COURT: What do you do with somebody who says the point of sale --

MR. KRASH: At which cigarettes are sold.

THE COURT: More human devices.

MR. KRASH: Those are put in the stores. The store owners want them frequently. You have a different type of problem.

THE COURT: Suppose the store owner won't put up a sign.

MR. KRASH: The store does not wish to? I do not know that we could compel them to do that. Obviously we could not.

THE COURT: You would have to sell them cigarettes?

MR. KRASH: I suppose a store would like to have

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the cigarettes.

THE COURT: I don't want to rule on this.

MR. KRASH: Let me say there are many vending machines where you don't have the advertising space, that is, other cigarettes will be advertised other than yours. They can only advertise four so you don't have the advertising space.

In any event, there is a controversy about that. There is a controversy as to, for example -- that's immediately put now, that's raised, as to with respect to this point of sale display. The Commission says "Look, you have not measured the space correctly for purposes of determining the size", where there is a counter rack with cigarettes they say "You should measure the entire rack with all the cigarettes plus the advertising display space", and we say the order refers only to advertising display space.

In any event, on that issue they say they are going to immediately sue us and they make very clear they are going to ask for large penalties. What do they rely on --

THE COURT: What do you mean, they say they are going to sak for large penalties?

MR. KRASH: They say in their letter they are going to sue us for civil penalties.

THE COURT: Civil penalties can be whatever is found to be reasonable.

MR. KRASH: That is correct.

Judge Tenney, what they go on to say, what they really rely on, urge your Honor to rely on, is a case called the Florsheim case. I just want to take a minute or two and I am nearing the conclusion.

I think that dramatizes the dilemma we have here. The Florsheim case is a case in which there was a cease and desist order which was appealed to the Court of Appeals for the Ninth Circuit and then the plaintiffs submitted a compliance report to the FTC and after that, while there was a dispute, the plaintiff went into the District Court and said, "Look, I am having a dispute about the compliance report, take jurisidction." Where did he go? He went to the District Court in the District of Columbia.

When the case got to the Court of Appeals Judge Levinthal said to the plaintiff "Look, if you have a question about the construction of an order which has been confirmed by the Court of Appeals you have a forum to go to. Go to the Court of Appeals for the Ninth Circuit. You don't have to come into this court for that question."

We don't have a remedy like that because there is no Court whichever approved this order. This was a

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consent order and we have no Court to which we can go.

Secondly, Judge Levinthal in that case was talking about a situation where there was a dispute as to a compliance report. That situation is analogous to the situation we had a year and a half or two years ago when we sent in our compliance report. I would agree that if you sent a compliance report and the FTC says "No, we don't agree with your compliance report", I would say if a plaintiff came to court then the short answer is "Just a minute, you can work that out with the FTC." But that is not our situation. You did not have in that case a situation where the FTC sent out a formal determination of violation and said, "We are sending the matter to the Attorney General or we are planning ourselves to institute a suit at once."

This is a critical point of distinction. I do not think that Judge Levinthal ever had in mind a situation where the FTC says to a party who is subject to an order, and they receive a formal notice of violation -- there you have a clear-cut controversy, an imminent controversy. So you have a very great difference between our case in that we have this formal determination that we are in violation of this order.

Let me say, Judge Tenney, a suit for a stay of

hs10

forfeitures is not a normal preliminary injunction situation. It's a special remedy, that is, it's designed to avoid forfeitures, to protect the party against the risk of forfeitures. Let me say there is a bona fide dispute here. There is a dispute between the plaintiffs, the six companies, and the Federal Trade Commission. For many months there has been an effort to try to discuss it back and forth. The FTC then sent us a letter and said, "Gentlemen, we are going to sue you as to most of the issues. If you want to talk to us about a few we will talk to you about those few, but as to the others we are going to sue you."

We are now in jeopardy. We are exposed to penalties under the St. Regis case and we think we have to promptly protect our rights and position here.

Our position then is this: If we are wrong we want to know it now, as promptly as possible. If we are right weshould be relieved of the burden of this overhanging penalties. And what we are suggesting to the Court is that this matter should be set down for trial expeditiously, as promptly as possible. We would conclude the discovery on any schedule your Honor would specify and we would go to trial promptly. We want a prompt resolution of this matter. We are not in any way seeking

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to delay anything. We want to proceed.

Now, the Federal Trade Commission in its brief I think makes an extremely important and I think very revealing concession here which makes clear our point that the Government is not going to be damaged. What do they say?

On page 23 of their brief they said there is no appreciable difference between this action, that is, the action we have brought, and an enforcement action they might bring, except, they say, by bringing the suit plaintiffs advance the date by which they can ask for a stay pendente lite.

Is it inequitable, Judge Tenney, if the Government agency sends you a notice under a consent order that you have violated the order and we are going to sue you, does it mean that a party has no remedy but must stand exposed, cannot do anything to protect its rights? That cannot be. The Supreme Court made it clear in St. Regis that you are not in that position and that is what Abbott Laboratories is all about. The Courts are not powerless, as Justice Harlan said.

I ask this: If there is no difference between an enforcement action and the action we have brought for declaratory judgment except for a stay is it not equitable

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and is it not common sense and judicial administration to say "All right, gentlemen, you have a controversy here, the plaintiffs have brought the suit here, and this is clearly an appropriate forum, three of the plaintiffs have their headquarters in New York, is this not the proper forum, you presented a clear-cut issue, there is a clear-cut controversy between the two parties", and we say we are prepared to proceed as expeditiously, as rapidly as the schedule of the Court will permit, we are prepared, we are not in any way seeking any long delay here at all, and what we would urge your Honor is to enter an order, grant the stay and set this matter down promptly for trial. That, it seems to me, is equitable. It will protect the position of the Government. They say the public interest requires prompt notification.

I may say, Judge Tenney, I think in this situation no one can possibly suggest that the public is not aware of the warning notice in advertising. It's become a matter that is omnipresent. It's all through the country. Everybody who can read can see that.

The question really here relates to these kinds of technical issues concerning whether the type size should be a little larger or a little smaller. That is what the argument of the FTC is about. They threaten us, warn us

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they are going to sue us for these penalties, and we say the proper thing to do in that situation is bring the matter to a Court and stay the penalties and let us have a prompt resolution. We say that is equitable. We say it puts us in a situation where we are not exposed day-to-day.

We are prepared, I emphasize, Judge Tenney, we are prepared to resolve the matter now, as promptly as possible, because we do not wish to be in a position where we are exposed to these large penalties, and in this case in the public interest there should be a prompt resolution of this kind of dispute.

The invitation they make as to a discussion of the matter, what is our status as these discussions go on? Are we exposed to all these penalties? We say that under St. Regis that the clear teaching of that is that there is jurisdiction here, that the proper course is that as a matter of equity the Court should, where there is a bona fide dispute as to issues, the Court cannot possibly resolve those issues on a preliminary injunction hearing obviously.

The question I think your Honor has to ask is have we made a showing that there is a bona fide legitimate dispute, and if we have I submit that there is jurisdiction and that the teaching of the St. Regis case in that situ-

ation is that a Court should grant a stay and promptly adjudicate the matter. We therefore respectfully urge your Honor to enter such an order.

THE COURT: Thank you.

MR. O'NEILL: Your Honor, may I address the Court.

THE COURT: Very briefly, yes.

MR. O'NEILL: My name is Dan O'Neill. I am with the firm of Chadbourne, Parke & Whiteside. We are attorneys for Standard Brands.

I have here copies of the advertising, if the Court is not familiar with them, a New York Times ad, a Time Magazine ad, a Newsweek ad.

Your Honor, each of these show a product of my client and show the warning statement as it appeared in the press. This is what we are talking about, your Honor, the warning that is in the box, the warning statement that is prescribed by Congress to be on cigarette packs and to be on cartons.

That identical warning statement has appeared on every pack of cigarettes --

THE COURT: I can't get into the issues, as enjoyable as that might be.

MR. O'NEILL: I wanted to get into the point of

public interest.

THE COURT: I understood there were some areas where there was a language problem.

MR. O'NEILL: I will address that immediately, your Honor.

MR. WEISBERG: Your Honor, we seem to be getting into the merits of the underlying case at the moment, and I am not sure that is appropriate in this proceeding.

MR. O'NEILL: Your Honor, I think just by way of background to show you two or three points to show why we have a bona fide dispute before us, why we are in this whipsaw impossible dilemma of do we continue doing what we are doing, do we change our advertising and how do we change it, and meanwhile penalties are running. You mentioned the question --

THE COURT: Penalties may be running. We are not talking about a fixed mandatory penalty. Let's get away from that concept.

MR. O'NEILL: We are talking about substantial risk. When we filed our compliance report after these orders were entered we filed with our compliance report copies of our then running Spanish language newspaper ads. The warning statement at that time was in English. We filed it that way.

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They wrote us a letter and said okay. Then they came in November 13th of 1973 and issued an enforcement policy statement unilaterally by the Commission c hanging a consent order, a contract, and unilaterally said, "You now have to put it in in Spanish."

THE COURT: You think that is unreasonable, to ask you to have it all in the same language?

MR. O'NEILL: No, but when the order itself says it has to be precisely in the language of the statute, the statute that requires the warning statement to be in English, and we have to comply with an order and do it with an order, now they say our translation is not reasonable. We think we are doing the right thing. We are being whipsawed by them.

THE COURT: All right.

MR. LONDON: If I may, your Honor, I don't want to talk about the merits. I just want to mention one point.

Your Honor indicated in connection with Mr. Krash's argument that perhaps the Court saw a distinction in a situation where the plaintiff sought a stay where the penalties were mandatory in one instance and discretionary in one instance. They are surely here.

I direct your attention to a case which was Not in our brief because we didn't come across it at the time

the brief was prepared. The name of the case is Rettinger against the Federal Trade Commission. It is cited at 392 Fed. 2d, page 454, and it is a 1968 decision by the Second Circuit Court of Appeals, and the decision was written by Judge Feinberg.

Very briefly, your Honor, that case involved a consent decree between a rainwear manufacturer and the FTC and the manufacturer was required under the decision under the consent order to have a certain label on the garments sold by it which disclosed their source of manufacture. He submitted a sample label. They approved it. For ten years every raincoat he sold had such a label.

Ten years later the Commissioin said, "You know, now that I look at that order I really decide that the label I agreed ten years ago was adequate is no longer adequate", a contention not entirely dissimilar to some in this case, and the manufacturer said, "Well, there are various reasons why I cannot change the label now because to do so would involve various financial costs to me", and the manufacturer brought -- the manufacturer then received a letter form the Federal Trade Commission advising that they considered his label to be not in compliance with his obligations under the order. The manufacturer brought a proceeding directly in the Second Circuit.

THE COURT: Not in the District Court.

MR. LONDON: Not in the District Court, in the Second Circuit, seeking a review, in effect, an appellate review or a mandamus review of that letter, and the Second Circuit said no, but it didn't say "You are out of court."

What Judge Feinberg says is "We think that your remedy is in the District Court."

There the Second Circuit specifically made note of the fact that there was a significant financial risk under Section 45(1) to this manufacturer. That is the same section we are talking about here, the same discretionary penalties. The Court specifically said that it understood that there was a significant financial risk.

"We are aware that it is possible" -- I am reading now from page 457 --

"We are aware that it is possible for petitioner to await a civil suit by the Commission to enforce its present interpretation of the 1956 order. In view of the financial risks involved, we understand why Rettinger would rather avoid this course."

It then goes on and suggests to Mr. Rettinger that he file an application, a complaint for a declaratory judgment in the District Court under the Administrative Procedure Act.

I bring that to your Honor's attention because I think it directly meets the Government's contention that because under 45(1) the penalties here are discretionary, therefore the plaintiffs have no rights.

THE COURT: I merely mentioned it because there are cases subsequent to this that hold to the contrary and this I would say was dictum.

MR. LONDON: May I respectfully suggest, your Honor, that the financial risk to these plaintiffs --

THE COURT: I am just addressing myself to your case.

MR. LONDON: -- is very real, and I would again reasset to your Honor the actual conundrum the plaintiffs are in.

THE COURT: There may be some steps they should take right away, but I am still saying they may not be in the right house.

MR. LONDON: I suggest to your Honor the Court does have jurisdiction, there is a bona fide dispute, and if there is any question about any injury to the Government's position at all I reassert Mr. Krash's suggestion, your Honor, that the Court could order at any schedule convenient to the Court a trial on the merits.

What is important to these plaintiffs, your

Honor, is that as long as there is no determination we automatically lose. No matter what happens in the determination we lose. We need a determination. sf the Court tells us we are wrong and we have to change the advertising then we will change it and if we are wrong and if we have to change our advertising then by golly we want to do it as soon as possible. We want to do it tomorrow morning if we are wrong. We don't think we are wrong and we don't think that we should have to run the risk of paying millions of dollars just for an opportunity to adjudicate. Coming to court is our right as well as a private person. A corporation has the same right. We want an adjudication.

We have dealt with the people from the Federal Trade Commission. The Federal Trade Commission staff has sent us an invitation to negotiate. The invitation to negotiate starts off "We are going to sue you." I myself have never seen such an invitation. I have been invited to parties before, Judge, but never one with that kind of invitation.

We want an adjudication, your Honor, and if we are wrong we want the adjudication promptly and if we are right we want the adjudication promptly.

THE COURT: Very well. I will hear from you.

MR. WEISBERG: Your Honor, I would first like

to direct myself towards plaintiffs" request for a stay and note that according to law they have a burden of proof here. They have to prove, No. 1, that they are going to suffer irreparable harm absent the grant of a stay, they have to prove that granting a stay will not harm the public interest, and they have to prove the probability of their case on the merits or probability of success on the merits.

I am not going to direct myself to the last point. The Court can look at the verified complaint submitted by the plaintiffs and the affidavits submitted by the Government and draw its own conclusion. However, the Government submits that they have not demonstrated that they would be subjected to irreparable harm if they are remitted to the civil enforcement proceeding, and secondly, they certainly haven't demonstrated that granting a stay will not hurt the public interest.

Now, as plaintiffs have said with reference to their stay, they rely primarily on the St. Regis case, and the St. Regis case, your Honor, is a dictum of the Supreme court which directs itself to a very narrow issue and it directs itself to the situation where a prospective litigant is confronted with accumulating penalties that are mandatory in nature. In other words, once the penalties attach at verdict the Court has no discretion

whatsoever to mitigate them. Consequently, if penalties of that nature are allowed to accumulate during negotiations and during the course of protracted litigation the plaintiff can be confronted -- I should say the alleged violator can be confronted with the possibility of commercial destruction.

The Courts feel that compelling somebody to litigate under that kind of threat or, in the alternative, submitting to what he believes in good faith is an unlawful order is too much of a burden on due process to be tolerated, and consequently, in that situation the Supreme Court has advised that a stay should be granted.

However, in sharp distinction, the penalties accumulating in this case are accumulating under 15 USC Section 45(l), which is part of the Federal Trade Commission Act. These penalties are purely discretionary in nature, but merely by virtue of the wording of the statute which establishes the $10,000 per day or $10,000 per violation penalty is only as a maximum. Consequently, it's been held repeatedly by the Courts that the District Court has the discretion to mitigate Section 45(l) penalties in accord with concepts of fair play and justice for any one of a variety of reasons.

Now, amongst those reasons I would just like

to specifically note that the District Court can mitigation Section 45(1) penalties if the FTC has unreasonably delayed in bringing the enforcement action or if there has been any delay, for that matter. Moreover, Section 45(m) of the statute, which was recently amended, specifically admonishes Courts that in the assessment of Section 45 penalties the Courts are not to assess violators an amount that they can't pay, Courts are not to assess violators an amount that would terminate their ability to conduct their business.

Consequently, the plaintiffs in this case are not fased with the possibility of irreparable harm. They are faced with the possibility of extreme damages. They are faced with the possibility that any litigant who is sued for a large amount is faced with, that he may be found guilty and that he will have to rely on the Court to assess damages fairly.

All the cases, and I admit that there are not a great number of them, there are two, in fact, that have considered this precise point before this Court, have distinguished the St. Regis case on this ground and have held that where there is the discrtion in the District Court to mitigate the accumulating penalties on the basis of fair play there is no burden on due process, there is no irrepar-

able harm sufficient to the plaintiff to permit him to obtain the stay.

The second distinction between this case and the St. Regis situation is that in the St. Regis situation there was no immediate threat to the public health. It was really a truly technical dispute between the FTC and the individual litigant involved or the corporate litigant involved.

However, in this case, your Honor, I feel at this late date there is really no doubt that the public is entitled to an adequate warning of the hazards of cigarette smoking. The FTC has determined that the present warning in print advertisements is inadequate.

THE COURT: Does it comply with the print size and measurements and all of that?

MR. WEISBERG: I gather that there are several assertions. One is that in some types of advertising there is no warning at all. In other types of advertising the warning is present but it's not sufficiently delineated to be physically clear to the public, that it could be clearer. This is not only billboards and transit cards, which are viewed at a distance, and, by the way, a transit card is in subways, trolleys, but also I gather with reference to magazines and newspapers as well.

I was going to suggest, and it's stated by numerous Courts, that the expertise of an agency like the FTC should be given some deference in considering these matters.

Consequently, the Government submits that by granting the stay in this case the possibility exists that the public will be denied what the FTC considers to be adequate warnings for a considerable period of time. I think it's self-evident that this holds in it a risk of injury to the public health.

THE COURT: I would have to consider whether it would be an invitation to other manufacturers to run into the District Court and circumvent the administrative procedures. I think the Court has got to consider that.

MR. WEISBERG: This has been discussed.

THE COURT: Any such decision I don't think would sit very well with my brethren on the Appellate Court.

MR. WEISBERG: The District Court in the DC District in the case of Florsheim versus Weinberger made specifically this point, that by granting a stay in this kind of situation you simply encourage all sorts of frivolous lawsuits for the purpose of delay.

THE COURT: I am not saying necessarily for

delay. It's possible in some Districts you might get a very rapid hearing.

MR. WE[illegible]RG: I want to make a point here that has been overlooked I believe. The plaintiffs have requested or have indicated their willingness to have a very quick trial and abide by whatever discovery procedure your Honor sees fit to order.

I am advised by my colleagues from the Federal Trade Commission, however, that the volume of documents alone that would have to be presented to fully adjudicate this case run into the millions. Really, I suggest to the Court on that basis alone a trial of this matter would be a rather protracted proceeding and there would be a substantial delay in any alteration of the cigarette advertising that might be required ultimately.

With reference to jurisdiction, your Honor, as I gather you are well aware by this time, the plaintiffs rely on the Abbott Laboratories case. The Government submits that this reliance is misplaced, that there are two critical distinctions that have to be drawn between the Abbott Laboratories case and the instant case before your Honor.

The first distinction is in effect set forth in Abbott Laboratories itself, where the Court at great

length examined and then held that there was no contrary legislative purpose which precluded judicial review of the enforcement of declaratory action brought by the plaintiffs in that case.

Secondly, I would like to note that the Administrative Procedure Act states that judicial review will not be granted where other adequate remedies exist.

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T3 Now, the legislative intent that the government is discussing here, and I am not going to belabor it since we set it forth with some detail in our brief, but the point is, one of the explicit purposes in turning over to the Federal Trade Commission control of regulations of accepted practices was to permit voluntary settlements and to keep these cases out of the courts to the extent possible. The specific purpose underlying this intent was expressed quite clearly by representative Lee, the House sponsor of the 1[illegible] amendment when he stated that the Congress did not w[illegible] the courts clogged with the thousands of trade cases that are handled voluntarily by the FTC and, secondly, they didn't want businessmen, many of them who had acted unwittingly being brought before the court in the first instance; they prefer voluntary settlements.

THE COURT: I think that is pointed out by this case, where you have consent orders. There has never been any court proceeding that I am aware of.

MR. WEISBERG: Not until now, yes.

THE COURT: That's what I mean, not until now.

MR. WEISBERG: The point is, your Honor, as has been indicated in the government's papers, the letter of August 1, 1975, had as a purpose getting the plaintiffs to come forward with a more reasonable settlement offer.

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There has been a lot of discussion that you don't invite people to litigate by threatening to sue them. I disagree with that. The government gets threats of suits all the time.

The court should consider there had been negotiations for quite a while prior to the issuance of the letter and they have been tough negotiations, and the FTC has a strong posture in this. Quite frankly, I am advised by the people in the compliance division that they were surprised by the response of plaintiffs herein.

The point is, your Honor, if you approve the response that plaintiffs made by granting them judicial review, it is clear that many of the prospective litigants before the FTC will follow the same course. The FTC is going to respond by bringing suits at an earlier date because they are not going to be very willing to give up their present discretion to determine when action should be brought, where they should be brought to the alleged violators.

Consequently, if judicial review is granted here, the court is going to encourage the bringing of premature suits and it really makes very little difference whether they are brought by the FTC or the prospective litigant. The point is that many voluntary settlements are going to be by-passed.

Another point the government would like to make is, if the court should deny our motion to dismiss, the government I assume is going to counterclaim for the civil penalties in this action and as Mr. Krash has noticed, there really isn't any substantial difference then, once that is done, between the two actions: the proposed enforcement action and this action. Consequently, the Administrative Procedure Act is very clear on this point. The court has no jurisdiction under those circumstances.

Even more importantly, we have two District Courts that have considered the issue before this court. The first is the D.C. Circuit in Florsheim v. Engen, and the Third, GMC v. Volpe, and the courts differ in their interpretation but they agreed should be dismissed, the D.C. circuit taking the view it should be dismissed on jurisdictional grounds and the Third Circuit contending it should be dismissed because while there is jurisdiction, the court should not exercise its equitable discretion under its discretion to hear a declaratory action. The distinctions Mr. Krash tried to apply are precisely on point as in this case, as in Florsheim. The Volpe case is analogous. In that case, the court was construing the National Traffic and Motor Vehicle Safety Act. Under that Act the government may serve upon an automobile manufacturer an order directing the manufacturer

to notify its customers of a defect in a particular vehicle.

If the manufacturer violates the order with respect to a single consumer, it is liable for a fine of $1,000 for each such violation up to a maximum of $400,000, and I might add that this statute also defines or lays in the District Court the power to mitigate penalties as the equities require.

In the Volpe case, GMC received such an order, they didn't comply and instead they brought a pre-enforcement action for judicial review.

In the Florshein case, the D.C. Circuit held on essentially similar facts, that there was no jurisdiction, number 1, because to grant judicial review in a case like this, you would confound the legislative purpose by clogging the court, that was the language both Judge Leventhal and Representative Lee used and, secondly, it would promote delay in the adjudication -- excuse me, settlement of these matters on voluntary basis.

Moreover, the D.C. Circuit found that where there is discretion in the District Court to mitigate accumulated penalties, a court with concepts of fair play and justice, that the burden of due process is removed and distinguishing specifically Abbott Laboratories on this point, the D.C. Circuit dismissed for jurisdictional reasons.

Now, in the Volpe case, the court held similarly, that is, the Third Circuit. They found in International Traffic and Motor Vehicle and Safety Act a congressional purpose to promote voluntary settlements and felt since there was a limitation on the upward levels of the penalties as provided by statute, that the enforcement form provided an adequate remedy.

The thread running through both of these cases is simply if there is a litigation on the accumulation of penalties that can be exercised in the enforcement proceeding, and then the enforcement proceeding is deemed to be adequate and safe form in which the alleged violator can make all his claims and defenses and it makes very little difference, your Honor, whether the limitations proposed to the discretion of the District Court or whether it is mandated by statute. If this limitation exists, the courts have found that there is no jurisdiction to consider this kind of pre-enforcement action and the government submits this court should hold similarly.

The government has a couple of other arguments which buttress this conclusion. The first is that Section 56, that is, 15 USC, Section 56, as it is presently written, requires that before the FTC can initiate a civil penalty action, it has to provide written notice to the Attorney

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General and consult with him. If the Attorney General, who is authorized under Section 45L to commence the action defers, then after 45 days, that is, 45 days after it has provided the notice, the FTC can commence and prosecute the action itself.

This is a new statute and the predecessor statute or one of the predecessors, I should say, of Section 56 required somewhat of a different scheme and that was that the FTC had to certify the facts to the Attorney General who had then the ultimate discretion to determine whether or not an action should be brought.

The Second Circuit construed this statute, that is, the predecessor statute in a case also against the St. Regis Paper Company but different from the one discussed before, and found that the certification of facts to the Attorney General was a jurisdictional prerequisite, absent which the government cannot sue in a civil enforcement action.

There is sound policy reason underlying this statute, the predecessor, and the present statute as well, the point being that before the government decides to litigate a trade case, it is desitable if the Attorney General can make an input in terms of his expertise as the government's litigant and the government's expert in civil court litigation and the FTC can make its input in the government's trade regulation

and enforcement. In other words, the Attorney General is to be given an opportunity to temper at hand any civil action, any civil action proposed prior to its commencement. On the other hand, the FTC by consulting with the AG is to be given opportunity to consider the pros and cons of its proposed adjudicated action including the determination whether it really wants to put its resources and manpower into a given piece of civil litigation which may be quite draining.

The government submits if pre-enforcement review is granted in this type of case, both the Attorney General and the FTC are absent from their statutory roles in this kind of consultation.

THE COURT: The Attorney General can't prevent the suit from being brought, can he?

MR. WEISBERG: Only by bringing it himself. He has lost what was once a veto power.

THE COURT: He doesn't have the power he used to have.

MR. WEISBERG: Correct.

Another point, your Honor, and this I did not include in Government's brief because I did not want to be placed in the position of even seeming to misrepresent that we are yet aware of exactly how much or now little the

plaintiffs herein may be sued for in a civil enforcement proceeding, but the point is this: The statute, Section 45L as it is now written, not only grants discretion to the District Court to mitigate, but the FTC can do it as well in the inception of the action by not suing for the maximum amount. Moreover, the FTC can sue for zero dollars and can seek conjunctive relief. Consequently, in terms of the precedential value of your decision, if you should grant judicial review, in many cases review will be granted where the matter isn't right because given the theory that the plaintiffs espouse at this juncture, really nobody knows how much they are going to be sued for in terms of penalties, if anything, or if the FTC is only going to seek injunctive relief.

I just have a few more minor remarks. It seems to me, your Honor, that the thrust of the plaintiffs' argument is that somehow they have a right to risk free litigation and as we all know, that is hardly a constitutional right and nobody litigates risk free. Given the strengthen of government's remedy in this case, i.e. the discretion of the District Court to assess what it thinks is a fair penalty, it really doesn't make any difference what the upper limit might be. Plaintiffs suggest that they be entitled to litigate risk free simply is not the case in any kind of

litigation.

I just wanted also to direct myself to the Rettinger case brought up by Mr. London. That was a case, your Honor, it's true, where the Second Circuit noted the financial risk to the plaintiff. The Second Circuit also noted that the enforcement remedy might constitute an inadequate remedy suggested by the government in this argument The Second Circuit did not make a decision on it, but remanded it to the District Court with that dual observation. Apparently, there was never any decision from the District Court. I gather the matter wasn't pursued further, so the issue as far as the Second Circuit is concerned, was merely defined, but never decided and that case, as far as authority is concerned, is a nullity and the recent cases are all in accord that stay in situations like this should not be granted, jurisdiction should not be granted or the court should not exercise its discretion to consider this type of case.

Thank you, your Honor.

MR. KRASH: May I have just two minutes, Judge Tenney.

I urge that the Court consider this matter in practical judicial administration and the relationship of a court to an administrative agency. Whatis the situation here which is what your Honor raised, I think. We have

hph 10

exhausted, as a practical matter, our administrative remedy. That is, the administrative agency has sent us this notice. They say in the affidavit, which was filed today, this morning, in opposition, they say that -- page 8 -- "Settlement was not reached because plaintiff would not submit all of the requested materials including copies of advertisements that were still being withheld." I thought everything was supplied. "Because plaintiffs were not agreed to comply with some of the staff's interpretation of the orders.

3. Because plaintiffs would not come forward with a full settlement offer including a figure for penalties.'

Let us suppose, your Honor decides you remit us to going back. We are at the very same point. The FTC staff will say, I have no reason to believe they have changed their mind, they will say we insist that you do what we have said in this letter. We say to them, we disagree. The Commission, by the way, has already taken the matter from the staff and have said that we have determined you violated. The FTC says, we want money penalties, and we think they said $6,000,000, but there is no question they said in the affidavit they wanted penalties and they said they were going to sue for penalties.

They then say, we will send a letter to the Attorney

General and he has 45 days to decide whether he will or will not. They said in the original letter to us they were immediately sending it to the Attorney General. This is now three weeks later.

THE COURT: There are delays, as counsel pointed out. That is something else. How have you exhausted your administrative remedy?

MR. KRASH: We have no other place to go to. What I mean Judge is, this is a letter they sent us, a formal determination. If we go back to the Commission, I don't know what further we can do. They said, we are sending it to the Attorney General. We could go talk to the Department of Justice, I presume, but in terms of an administrative remedy, a statutory remedy, there is nothing further that the agency would do. I'm not talking about the reserved issues as to the billboards. But, after all the violations here there is nothing further the agency as a practical matter will do. There is no further procedure or remedy we have. There is nothing we can ask them to do we have not asked them and there is no further remedy open to us.

I think the case he cites to us, the GMC case, makes the point very dramatically clear why there is a great difference. The auto safety agency enters an order and

General Motors sues on Monday in Delaware, but what he didn't tell you was, the government sued on Tuesday in the District of Columbia. If the government had done that, then we would have gone to the District Court and asked for a stay. But they haven't done that. They have said to us, you are now in violation and what do we as a practical matter do? Judge, this isn't a normal situation you have with the FTC where people are arguing about a compliance report. It isn't a situation even where there is an argument going on where the parties have complied with an order which goes on every day and with which the courts obviously can't be burdened.

I would invite counsel for the government to show you a situation where there is a formal determination which was sent to the parties, where they say that we are going to sue you for penalties. All that will happen now, therefore, is that within a short time or some time, I don't know when, they will send it to the Attorney General and he will decide whether or not he wishes to bring an action and then they will sue us and the government itself says in its papers, your Honor, there is no difference between we're suing the defendants and their suing us, there is no difference between their bringing a suit against us and we against them except that a stay is asked. As a practical matter, the judicial

administration, which is what are the interests of a protecting court, which I say of course is a legitimate consideration, but I say have we satisfied the tests of jurisdiction laid down in Abbott Laboratories. Is there a bona fide dispute which is ripe for adjudication. If there is not, the court can say "Go and do not darken my door" but if there is a controversy, and look at what they say from their own papers, there is an immediate controversy here, then the only question is, while this controversy goes on, what should we do about the penalties accumulating day to day. Counsel for the FTC says, well, every litigant has to stand at risk. I agree that with respect to anything that occurred prior to the 1st of August, that will have to be determined. But, I say to you thought, while the litigation is going on, that what is equitable is, because there is time required for litigation, the courts have to have a reasonable time, and I say my distinguished friend greatly exaggerates what is involved, we say stay it and let us properly adjudicate.

I think in terms of the practicality of judicial administration and relationship with agencies that this is a situation ripe and we would therefore say to your Honor there would be nothing gained by deferring the exercise of jurisdiction in this situation.

Thank you, Judge Tenney.

THE COURT: But not granting a stay.

MR. KRASH: That you would enter an order which would grant a stay of further accumulation and set the matter down promptly --

THE COURT: I have to read these papers, but I am not inclined to stay penalties. As to jurisdiction, I would have some reservation, but I haven't had an opportunity to study it. I can see grave dangers as to enforcement under the Federal Trade Commission. I think however, you are protected by the fact that it is not a definite penalty. I don't want to prejudge the case. Possibly you should be paying penalties every day and if I stay it, then the time comes to impose the penalties and the stay is lifted, and you are restricted to a maximum per day. I'm just mentioning that.

MR. KRASH: With respect to our application for a prompt trial --

THE COURT: I am not inclined at the moment. If I would try it, it would be a matter of weeks. I have a heavy criminal case, and I have to give priority to criminal cases and I think that's true of other judges in the court.

MR. KRASH: The FTC has filed a motion here, your Honor, a motion to dismiss the complaint on these various

jurisdictional grounds.

THE COURT: I am not deciding anything. I am merely giving you my feelings so far as the stay is concerned.

MR. KRASH: May we have 14 days to respond to their motion to dismiss, your Honor?

THE COURT: If I don't issue a stay, I assume the Commission has no objection.

MR. WEISBERG: Your Honor, the only problem I have with that is a practical problem. I am going to be on vacation in the latter part of September and I wouldn't be -- I assume I will have the right to make a reply?

MR. KRASH: We have no objection.

MR. WEISBERG: May I ask to make a reply, if necessary?

MR. KRASH: Certainly, I have no objection.

THE COURT: All right.

MR. WEISBERG: Your Honor, may I make one or two brief remarks?

THE COURT: Yes.

MR. WEISBERG: I would like to just clarify one point, and if not clarify, get the government's position before the court, and that is plaintiffs were advised the penalties would be $6,000,000. I understand this figure came up when the plaintiffs inquired of staff what their

maximum exposure was which they were informed was roughly $6,000,000 for all six companies.

Secondly, I just want to point out briefly, once the government counterclaims in an action by plaintiffs preenforcement, it tends to mitigate the liabilities of the plaintiff. There are still substantial differences. The biggest difference is the precedential value granting preenforcement review which I have indicated flies in the face of the legislative intent and it simply is not countenanced by law and counsel for plaintiffs keeps asking to override it and the government submits the court should not do it.

THE COURT: I think I indicated that I was concerned and--

MR. WEISBERG: I am not so sure I can hear you as well as they can.

MR. O'NEILL: Your Honor, I can't sit by and let the U.S. Attorney make a statement on the record without contradicting it vehemently. That's not my recollection of the way negotiations were conducted. Many of the statements in the government's affidavit, to my recollection, are wrong, are absolutely wrong, just plain simply misleading and wrong, and I can't sit by and let counsel, who wasn't present at the negotiations, make that statement without being

contradicted.

THE COU You mean about the 6,000,000?

MR. O'NEILL: Yes, your Honor. We were told as to my client, before we tell you what you did wrong, put money on the table, substantial amounts of money, and we said, what are you talking about, and they said upwards to a million dollars and that's how it came up to the other companies also.

MR. WEISBERG: Your Honor, I don't want to get involved in a dispute. Obviously I don't know what happened but in talking to my colleagues from the FTC, who advised me of the matters, I would like to add that counsel has implied the FTC told the plaintiffs we are not going to negotiate with you unless you come up with the money first and this isn't the understanding that was communicated to me. In fact, I gathered there were very detailed negotiations as to the practices and the specific advertisements that were considered.

Thank you.

THE COURT: I hope that nothing that has been said here will discourage further conferences.

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ORDER OF CONSOLIDATION

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

BROWN & WILLIAMSON TOBACCO CORPORATION,

Plaintiff,

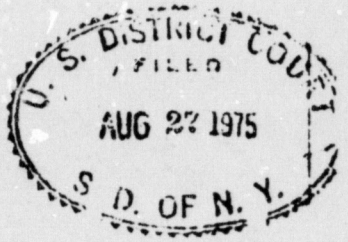
v.

LEWIS A. ENGMAN, Chairman, Federal Trade Commission, et al.,

Defendants.

ORDER OF CONSOLIDATION

75 Civ. 4047 (CHT)



PHILIP MORRIS INCORPORATED,

Plaintiff,

v.

LEWIS A. ENGMAN, Chairman, Federal Trade Commission, et al.,

Defendants.

75 Civ. 4048 (KTD)

R. J. REYNOLDS TOBACCO COMPANY,

Plaintiff,

v.

LEWIS A. ENGMAN, Chairman, Federal Trade Commission, et al.,

Defendants.

75 Civ. 4049 (KTD)

LOEW'S THEATRES, INC.,

Plaintiff,

v.

LEWIS A. ENGMAN, Chairman, Federal Trade Commission, et al.,

Defendants.

75 Civ. 4050 (CBM)

Order of Consolidation

AMERICAN BRANDS, INC.,

Plaintiff,

v.

FEDERAL TRADE COMMISSION, et al.,

Defendants.

75 Civ. 4051 (CLB)

LIGGETT & MYERS INCORPORATED,

Plaintiff,

v.

LEWIS A. ENGMAN, Chairman, Federal Trade Commission, et al.,

Defendants.

75 Civ. 4052 (CLB)

WHEREAS, the six captioned actions have been commenced in this Court; and

WHEREAS, each of these six cases raises common questions of law and fact;

NOW, upon the motion of Paul J. Curran, United States Attorney for the Southern District of New York; it is hereby

ORDERED, that the captioned cases be and hereby are consolidated pursuant to Rule 42(a) of the Federal Rules

Order of Consolidation

of Civil Procedure and Rule 13 of the Rules for the Administration of the Civil and Criminal Calendars of the Southern District of New York.

Dated: New York, New York

August 25, 1975

Charles H. Tenney

CHARLES H. TENNEY
U. S. D. J., S. D. N. Y.

MEMORANDUM AND ORDER APPEALED FROM

FILED
U.S. DISTRICT COURT
AUG 26 11 23 AM '75
S.D. OF N.Y.

#43008 Inc

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

BROWN & WILLIAMSON TOBACCO CORPORATION,

Plaintiff,

-against-

LEWIS A. ENGMAN, Chairman, Federal Trade Commission, et al.,

Defendants.

75 Civ. 4047 (CHT)

Filed

PHILIP MORRIS INCORPORATED,

Plaintiff,

-against-

LEWIS A. ENGMAN, Chairman, Federal Trade Commission, et al.,

Defendants.

75 Civ. 4048 (KTD)

R. J. REYNOLDS TOBACCO COMPANY,

Plaintiff,

-against-

LEWIS A. ENGMAN, Chairman, Federal Trade Commission, et al.,

Defendants.

75 Civ. 4049 (KTD)

LOEW'S THEATRES, INC.,

Plaintiff,

-against-

LEWIS A. ENGMAN, Chairman, Federal Trade Commission, et al.,

Defendants.

75 Civ. 4050 (CBM)

Memorandum and Order Appealed From

AMERICAN BRANDS, INC., Plaintiff, -against- FEDERAL TRADE COMMISSION, et al., Defendants.	:	75 Civ. 4051 (CLB)
LIGGETT & MYERS INCORPORATED, Plaintiff, -against- LEWIS A. ENGMAN, Chairman, Federal Trade Commission, et al., Defendants.	:	75 Civ. 4052 (CLB) MEMORANDUM

TENNEY, J.

Plaintiffs, the six major producers of cigarettes in this country,[1/] have moved by order to show cause for an Order of this Court granting them preliminary injunctive relief staying, pending final judgment, the accumulation of civil penalties for alleged violations of the identical consent orders entered into by each of the companies with the Federal Trade Commission in March of 1972. For the reasons stated below, the request for a preliminary injunction is denied.

The purpose of a preliminary injunction is to preserve the status quo pending a determination on the merits. Checker Motors Corp. v. Chrysler Corp., 405 F.2d 319, 323 (2d Cir.),

cert. denied, 394 U.S. 999 (1969); Hamilton Watch Co. v. Benrus Watch Co., 206 F.2d 738, 742 (2d Cir. 1953). Such an injunction may never be obtained as a matter of right, but is clearly addressed to the discretion of the district courts. Yakus v. United States, 321 U.S. 414 (1944); Checker Motors Corp. v. Chrysler Corp., supra, 405 F.2d at 323.

Historically this remedy has been viewed as drastic or extraordinary in nature and, absent a clear showing that movant has carried the burden of persuasion, the relief will be denied. Dopp v. Franklin National Bank, 461 F.2d 873, 878 (2d Cir. 1972); Checker Motors Corp. v. Chrysler Corp., supra, 405 F.2d at 323. That burden consists of showing either a reasonable probability of success on the merits and irreparable injury or that movants have raised serious questions going to the merits and that the balancing of the equities tips decidedly in their favor. Robert W. Stark, Jr., Inc. v. New York Stock Exchange, Inc., 466 F.2d 743, 744 (2d Cir. 1972); Checker Motors Corp. v. Chrysler Corp., supra, 405 F.2d at 323; Crimmins v. American Stock Exchange, Inc., 346 F. Supp. 1256, 1258-59 (S.D.N.Y. 1972). An additional factor of relevance to be considered is the public interest. American Motorists Ins. Co. v. City Wide Transportation Co., 308 F. Supp. 1080, 1084 (S.D.N.Y. 1969); 7 J. Moore, Federal Practice ¶ 65.04[1], at 47 (2d ed. 1948).

Since the issues of irreparable harm, the balancing of the equities, and the public interest will be dispositive of

the motion, the Court will move directly to a consideration of those issues. Assuming, for the moment, that plaintiffs have at least raised serious questions going to the merits, they must then demonstrate that, on balance, the equities in the present situation tip decidedly in their favor. In the alternative, assuming that plaintiffs have demonstrated a reasonable probability of success on the merits, then they must further demonstrate irreparable injury in the absence of the relief requested.

On the question of irreparable injury, plaintiffs allege that they face a denial of due process should the stay be denied. In the absence of this relief, plaintiffs feel that they are placed in an impossible predicament, i.e., they are faced with a choice of acquiesing in the findings of the Federal Trade Commission (regarding violations of the 1972 consent order) which they consider to be erroneous, or of awaiting the Commission's enforcement proceeding in the face of ever-mounting civil penalties. This dilemma, plaintiffs contend, would, in effect, deny them a forum in which to protest the ruling and, in doing so, deny them due process. In support of this argument they cite St. Regis Paper Co. v. United States, 368 U.S. 208 (1961).

The St. Regis case, however, is distinguishable from the instant case. The penalty provision applicable in St. Regis was mandatory in nature. The penalty provision applicable in the instant case, 15 U.S.C. § 45(l), reads as follows:

> "(l) Any person, partnership, or corporation who violates an order of the Commission after it

> has become final, and while such order is in effect, shall forfeit and pay to the United States a civil penalty of not more than $10,000 for each violation, which shall accrue to the United States and may be recovered in a civil action brought by the Attorney General of the United States. Each separate violation of such an order shall be a separate offense, except that in the case of a violation through continuing failure to obey or neglect to obey a final order of the Commission, each day of continuance of such failure or neglect shall be deemed a separate offense. In such actions, the United States district courts are empowered to grant mandatory injunctions and such other and further equitable relief as they deem appropriate in the enforcement of such final orders of the Commission." (Supp. 1975) (emphasis added).

As can clearly be seen, the penalty provision of § 45(1) merely fixes the upper limit of the penalty and any penalties to be ultimately assessed are discretionary with the court. United States v. J. B. Williams Company, Inc., 498 F.2d 414, 438 (2d Cir. 1974); United States v. Beatrice Foods Co., 322 F. Supp. 139, 141 (D. Minn. 1971).

In reaching its decision as to the imposition of penalties, the Court may consider, inter alia, the ability of the violator to pay, the good or bad faith of the violator, the degree of due care exercised, the injury to the public, and the delay on the part of the Federal Trade Commission in initiating the enforcement suit. United States v. J. B. Williams Company, Inc., supra, 498 F.2d at 438; United States v. Ancorp National Services, Inc., 367 F. Supp. 1221, 1224 (S.D.N.Y. 1973); United States v. Beatrice Foods Company, 351 F. Supp. 969, 971 (D. Minn.

1972), aff'd, 493 F.2d 1259 (8th Cir. 1974), cert. denied, 43 U.S.L.W. 3474 (U.S. March 4, 1975); United States v. H. M. Prince Textiles, Inc., 262 F. Supp. 383, 388-89 (S.D.N.Y. 1966). Thus, penalties to be assessed, if any, will be tempered by these considerations.

In addressing this question as well as the question of the public interest involved in the request for a stay of an assessment of penalties under § 45(1), the United States District Court for the District of Columbia (per Parker, J.) stated:

> "The strong public interest in this area requires that possible penalties not be stayed pending such litigation in order to avoid encouraging frivolous suits for purposes of delay. Of course court administrative delays and the plaintiff's good faith on the one hand, and, as in this case, the unreasonableness or frivolousness of plaintiff's grounds for review on the other hand, are factors which a court may consider in assessing penalties. United States v. H. M. Prince Textiles, Inc., 262 F. Supp. 383 (S.D.N.Y. 1966)." Floersheim v. Weinburger, 346 F. Supp. 950, 956 (D.D.C. 1972).

This Court is in agreement with the views expressed by Judge Parker in Floersheim and must conclude that plaintiffs have failed in their burden of showing either irreparable injury or that the balancing of the equities tips decidedly in their favor. Far from being subjected to a denial of due process, plaintiffs' risks here are no greater than the risks attendant in any litigation. In the face of these findings and in light of the remarks made by Judge Parker in Floersheim, it seems unnecessary to comment further on the question of the public interest.

Accordingly, plaintiffs' motion for a preliminary injunction is denied.

So ordered.

Dated: New York, New York
August 28, 1975

Charles H. Tenney
U.S.D.J.

BROWN & WILLIAMSON TOBACCO CORPORATION,

Plaintiff,

-against-

LEWIS A. ENGMAN, Chairman, Federal Trade Commission, et al.,

Defendants.

75 Civ. 4047 (CHT)

(and consolidated cases: 75 Civ. 4048 (KTD), 75 Civ. 4049 (KTD), 75 Civ. 4050 (CBM), 75 Civ. 4051 (CLB), 75 Civ. 4052 (CLB))

FOOTNOTE

1/ Mr. Weisberg, the Assistant United States Attorney, made a motion on the record in open court on August 25, 1975 for consolidation of the six cases filed in this Court. The motion was granted and the Assistant United States Attorney was directed to submit an order to that effect.

COUNTER AFFIDAVIT OF H. T. AUSTERN ON MOTION TO DISMISS AND TO SUPPLEMENT RECORD ON APPLICATION FOR STAY OF PROCEEDINGS WITH EXHIBITS

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

BROWN & WILLIAMSON TOBACCO CORPORATION, Plaintiff, v. LEWIS A. ENGMAN, Chairman, Federal Trade Commission, et al., Defendants.	75 Civ. 4047
PHILIP MORRIS INCORPORATED, Plaintiff, v. LEWIS A. ENGMAN, Chairman, Federal Trade Commission, et al., Defendants.	75 Civ. 4048
R. J. REYNOLDS TOBACCO COMPANY, Plaintiff, v. LEWIS A. ENGMAN, Chairman, Federal Trade Commission, et al., Defendants.	75 Civ. 4049
LOEW'S THEATRES, INC., Plaintiff, v. LEWIS A. ENGMAN, Chairman, Federal Trade Commission, et al., Defendants.	75 Civ. 4050

AMERICAN BRANDS, INC.,		
Plaintiff,	:	75 Civ. 4051
v.	:	
FEDERAL TRADE COMMISSION, et al.,	:	
Defendants	:	
LIGGETT & MYERS INCORPORATED,		
Plaintiff,	:	75 Civ. 4052
v.	:	
LEWIS A. ENGMAN, Chairman, Federal Trade Commission, et al.,	:	
Defendants.	:	

COUNTERAFFIDAVIT ON MOTION TO DISMISS
AND TO SUPPLEMENT RECORD ON
APPLICATION FOR STAY OF PROCEEDINGS

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

H. T. AUSTERN, being duly sworn, deposes and says:

1. I am an attorney, a member of the District of Columbia and New York bars, and a partner in the firm of Covington & Burling, Washington, D.C. With Horace R. Kornegay, Esq., of Washington, D.C., as co-counsel, I represented the six plaintiff cigarette manufacturing companies from July 1971 through March 30, 1972, the date the Consent Cease and Desist

Orders were issued, in the negotiation of those Orders with which this proceeding is concerned.

2. Thereafter and until May 15, 1974, as counsel I advised the six companies as to the interpretation of the negotiated Orders and as to the comprehensive Compliance Reports with accompanying exhibits filed by each of the companies in September 1972.

3. From May 15, 1974, until August 1, 1975, Mr. Kornegay and I were charged with the responsibility, at the direction of those companies, of cooperating with the staff of the Federal Trade Commission in its investigation of compliance with the Orders. I participated as counsel and am familiar in depth with each of the informal investigative conferences by the staff with the employees of seventeen advertising agencies and the employees of each of the plaintiff companies interviewed in the cooperative investigation. I also served as the vehicle for submission to the Commission staff of many hundreds of documents, magazine and newspaper advertisements, and physical point-of-sale materials which the companies submitted in response to informal Commission staff requests.

4. Between May 15, 1974, and August 1, 1975, I represented, again with Mr. Kornegay, the six plaintiff cigarette manufacturers in the intensive and extensive discussions with the Commission staff in efforts to reach a resolution of the controversy, and we prepared and signed the Statement to

Accompany Staff Report and Recommendations Concerning Past and Future Compliance With the Six Cease and Desist Orders of March 30, 1972, filed with the Commission on March 14, 1975, in order fully to exhaust all available resolutions to this controversy short of a prior agreement to pay substantial civil penalties or civil penalty litigation.

5. In the affidavit filed in this proceeding by Eric M. Rubin, Esq., of the Federal Trade Commission staff ("based on information and belief" inasmuch as he did not have any connection with these events until January 1975), there are a series of major errors of fact which serve to distort and to misrepresent the position in which the plaintiff companies have been placed, which position has necessitated their resort to equitable relief in this Court. Because of these fundamental errors and the obligation of all parties to have the true facts before this Court, affiant has been requested by the plaintiffs to present the following salient corrections to the Rubin affidavit based on affiant's own direct knowledge. Accordingly, this affidavit is being filed to respond to Mr. Rubin's affidavit, in order to supplement the record on plaintiffs' application for a stay of penalties and in support of plaintiffs' memorandum in response to defendants' motion to dismiss the complaints. Complete information of every fact up to and through March 14, 1975, when the plaintiffs' Statement to Accompany Staff Report was presented to the Commission itself, is fully reflected in the copy of that Statement and the volume of

documentation which accompanied it, included here as Attachment A. That Statement is referred to in Paragraph 18 (p. 9) of Mr. Rubin's affidavit.

A. Exhaustion Of Administrative Remedies In Efforts At Resolution Of The Controversy

Rubin Affidavit: "Despite plaintiffs' allegations . . . the Commission's staff never set as a pre-condition to beginning settlement discussions a requirement that plaintiffs must agree to 'a lump sum payment of about $6 million penalties.'" (Para. 16, p. 8.)

"In other words, settlement talks broke down because plaintiffs would not agree to abide by staff's interpretation of the Orders, and not because of any demand by staff that plaintiffs make any 'lump sum payment' as a pre-condition to even having settlement discussions." (Para. 17, p. 8.)

". . . plaintiffs submitted to the Commission a lengthy Statement of Position . . . (2) which misrepresented that the staff had instead demanded that the plaintiffs must put up a huge sum as penalties for past and unspecified violations as a pre-condition to further discussions . . . ." (Para. 18, p. 9.)

6. Facts. In the latter part of November 1974 during the staff informal interviewing of the employees of one company, Mr. Maurice S. Meyer, Mr. Rubin's predecessor as Assistant Bureau Director for Compliance, called Mr. Kornegay out of the room and stated to Mr. Kornegay that settlement would require massive money payments as penalties for alleged violations in the past. (See Kornegay Counteraffidavit, Para. 4.) On November 27, 1974, in a further discussion by co-counsel with Mr. Meyer and his

staff, the proposal for monetary offers was again described by him as having to be a financially "painful settlement." We pointed out that in the absence of any specifics as to the relevant total number of alleged violations he might assign to each company, nothing could be formulated on this precedent point. At a further meeting on December 16, 1974, with Mr. Meyer and his staff, we urged that an amicable resolution, based on the initial payment of monies by the companies, required that there be some indication of what was to be paid by each company based on specification of the violations charged against it. In response there were afforded only generalized indications of the staff position on various categories of advertising, stressing its view that all cigarette advertising since 1972 had violated the Orders. The staff adverted only to examples of their theories, and stated that they would ask for a $10,000 per day penalty for each unspecified advertisement in the general categories.

7. On December 20, 1974, in a further discussion, Mr. Meyer presented the following schedule as to what he would recommend as an overall and prerequisite monetary demand per company for past violations:

R.J. Reynolds	$1,750,000
Philip Morris	1,500,000
American Brands	950,000
Brown & Williamson	900,000
Lorillard	875,000
Liggett & Meyers	325,000

When pressed as to how these sums for past violations had been determined, no detail was afforded. It was announced that

the staff recommendations for penalty actions were scheduled to go forward to the Director of Compliance on or about January 15, 1975, and would thereafter be reviewed by Mr. J. Thomas Rosch, the Director of the Bureau of Consumer Protection.

8. On January 16, 1975, we forwarded to Mr. Rosch an Aide Memoir (Tab A in the exhibits to the subsequent attached Statement of Position (March 14, 1975)) stressing that any resolution would require agreement as to what would constitute compliance in the future "because hundreds of millions of dollars of future advertising and promotional materials are concerned along with potential civil penalties once the Commission has notified the respondents of its views as to these points at issue." That Aide Memoir (pp. 14, 23, 32, 35, 38, 39) contained recommendations and suggested accommodations by the plaintiffs for the resolution of future compliance questions.

9. On February 7, 1975, in a final conference with Director Rosch, his Deputy, Mr. Rubin (the author of the affidavit), and another staff lawyer, Mr. Rosch stated the conclusions of the Bureau as being that there were widespread violations of the Orders with respect to vending machines, point-of-sale materials, and billboards, as well as "shrinkage" in newspaper production, type size, and the foreign language issue. As to each advertisement in each of these broad categories, his indication was that a $10,000 per day penalty for each advertisement would be asked. He stated that while agreement for the

future might be worked out, it would be a waste of time to explore the subject of future compliance unless there were an advance firm monetary settlement which, he emphasized, would involve substantial civil penalties. Later the position was stated that while details of future compliance could eventually be worked out, these could not be addressed because that would be placing "the cart before the horse" absent large monetary offers. These were stated by Mr. Rosch to be "piles of money" because the violations were worth a substantial amount of money to the Commission, much more than the cost of litigation, and certainly much more than $500,000 for asserted past violations.

10. Comment was flatly refused by Mr. Rosch and his staff on the accommodations the respondents offered to make on future advertising. Mr. Rosch then stated that he was instructing Mr. Rubin to prepare draft penalty complaints and a report to be reviewed by the Commission. That was scheduled, he stated, to be forwarded to the Commission on March 9, 1975, and simultaneously the industry could submit its own Statement to the Commission.

11. Mr. Rosch was asked whether representatives of the industry could discuss their position directly with the Commission, and he said that would be opposed. No such opportunity was ever afforded.

12. On March 14, 1975, the plaintiffs, over the

signatures of Mr. Kornegay and this affiant, submitted directly to the Commission the Statement to Accompany Staff Report, attached to this affidavit. That Statement stressed the public reports in 1972 and 1973 by the Commission to Congress that plaintiffs were in compliance, the course of the plaintiffs' attempt to negotiate with the staff, the paramount need for working out an understanding as to future compliance on which the plaintiffs had offered various accommodations, and the adamant position of the staff in refusing to discuss such clarifications absent a threshold overall payment of large sums for largely undetailed past violations.

13. Despite these intensive and prolonged efforts at resolution of the controversy, no further communication from the Commission, as distinguished from the staff, was received until the "determinations" officially announced in the letters of August 1, 1975, to each company to the effect that the Commission had determined that violations existed. The August 1, 1975, communications recited that

> "The Commission received and carefully considered [the] Statement of Position prior to making its determination in this matter."

It further announced that the Commission would immediately notify the Department of Justice of its intention to file penalty actions in four categories of alleged violation. These formal communications designated generally the various categories of advertising "determined" by the Commission to have been and

continuing to be in violation of the Orders. In the letter to American Brands, for example, there was no specification whatsoever of the specific violations so determined. In letters to other companies, there were isolated examples offered as illustrating the asserted violations of entire categories of voluminous advertising in magazines, newspapers, and on promotional materials.

14. After these many months of attempted resolution, and on the basis of an undisclosed staff report, the Commission's only response was the six letters sent to the plaintiffs on August 1, 1975. Those letters were a final determination that plaintiffs' advertising in broad categories is in violation of the Consent Orders, and the Commission has finally and officially directed that for those determined violations (other than two temporarily deferred categories of advertising) penalty actions should be instituted. No administrative remedy remains available.

B. The Inaccurate Characterizations Of Plaintiffs' Compliance Reports And The Commission's Public Reports To Congress As Of December 31, 1972, And December 31, 1973

Rubin Affidavit: "9. In its report to Congress dated December 31, 1972, the Commission . . . stated that beginning in May 1972 cigarette advertisements had appeared with the health warning disclosed according to the format of those orders, meaning that after that date the warning was no longer appearing as part of a package depiction." (Para. 9, p. 5.)

"10. In the next annual report to Congress issued January 23, 1974, the Commission paraphrased its earlier statement to

> Congress stating that 'by October of 1972 almost all cigarette advertising published in this country was in compliance with the terms' of the Orders. In making this statement the Commission was simply continuing to act in good faith reliance on plaintiffs' 1972 reports of compliance." (Para. 10, p. 5.)

15. Facts: Apart from Mr. Rubin's seeking to characterize and qualify in 1975 a Commission official Report to Congress in 1972 and 1973, with which he was presumably not concerned, affiant sets forth the following facts as to what the Commission and its staff knew when it made those reports.

Paragraph 7 of the Rubin affidavit is in error in stating that the Compliance Reports submitted by each company in September 1972 were incomplete and included only proofs and not copies of the actual advertisements as published and seen by consumers. As alleged, e.g., American Brands, Inc., complaint Paragraphs 34-35, and Exhibits D-E, the Commission accepted those Reports. Those Compliance Reports recited how respondents were complying, and contained examples of advertisements in the various categories of magazine and newspapers, representative POS materials, and billboard representations. Each of those embodied precise formats disclosing relative sizes of the rectangle and type sizes in accordance with respondents' understanding of what had been negotiated in the Orders. They disclosed respondents' methods of measuring the "advertising display area" in POS materials. Even more important, one Compliance Report contained what are known as "tear sheets," or actual

pages from newspapers which were not merely "proofs" despite Mr. Rubin's assertions (Para. 7, p. 5) that they were not "copies of the advertisements as they are actually published and seen by consumers." Thus, newspaper "shrinkage" in newspaper production was in fact disclosed to the Commission as compliance in the Compliance Reports on which Mr. Rubin now affirms the Commission "was simply continuing to act in good faith reliance" in officially reporting to Congress in January 1974 that "almost all cigarette advertising published in this country was in compliance with the terms" of the Orders. In fact, the respondents relied on good faith on that Commission official report.

16. The assertion (Rubin Affidavit, Para. 10, p. 5) that in reporting compliance to Congress in 1972 and 1973 the Commission relied only on the voluminous exhibits to the six Compliance Reports filed in September 1972 is contradicted by other manifest facts. In a press conference on January 31, 1972, the Commission representatives reportedly had announced that the Commission would carefully monitor compliance with the Consent Orders. (See Statement to Accompany Staff Report, March 14, 1975, p. 2.) There is and cannot be any denial by Mr. Rubin that the warning statement prescribed by the Consent Orders had by December 31, 1972, and December 31, 1973, appeared in thousands of cigarette advertisements.

17. There are other minor errors of fact in Mr. Rubin's affidavit. These, however, need not be presently

corrected inasmuch as they are not relevant to this Court's determination of the bases for jurisdiction, and for a prompt resolution of the controversy as to the meaning of the Consent Orders, in the light of the position in which the Commission has placed plaintiffs and the hazards of massive continuing penalties to which they are exposed. Affiant submits that each of the major errors of fact in Mr. Rubin's affidavit, of possible relevance on the present motion, has been demonstrated.

H. T. Austern

Subscribed and sworn to before
me this 5th day of September, 1975

Notary Public

SARAH SHULMAN
Notary Public, State of New York
No. 31-8-3[illegible]
Qualified in [illegible] County
Commission Expires March 30, 1976

ATTACHMENT A--STATEMENT TO ACCOMPANY STAFF REPORT AND RECOMMENDATIONS CONCERNING PAST AND FUTURE COMPLIANCE WITH THE SIX CEASE AND DESIST ORDERS OF MARCH 30, 1972 ANNEXED TO COUNTER AFFIDAVIT OF H. T. AUSTERN

FEDERAL TRADE COMMISSION

STATEMENT TO ACCOMPANY STAFF REPORT AND RECOMMENDATIONS CONCERNING PAST AND FUTURE COMPLIANCE WITH THE SIX CONSENT CEASE AND DESIST ORDERS OF MARCH 30, 1972

AMERICAN BRANDS, INC.

BROWN & WILLIAMSON TOBACCO CORPORATION

LIGGETT & MYERS INCORPORATED

LORILLARD, A DIVISION OF LOEW'S THEATRES, INC.

PHILIP MORRIS INCORPORATED

R. J. REYNOLDS TOBACCO COMPANY

March 14, 1975

A 316

Attachment A--Statement

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BINGHAM D. LEVERICH
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RICHARD D. COPAKEN
CHARLES LISTER

March 14, 1975

J. Thomas Rosch, Esquire
Director
Bureau of Consumer Protection
Washington, D.C. 20580

Dear Mr. Rosch:

In accordance with our understanding, pursuant to which you advised me that as co-counsel for the six respondent cigarette manufacturers Mr. Kornegay and I would be required to file the Statement to accompany the Staff report and recommendations concerning past and future compliance with the six identical cease and desist orders of March 30, 1972, by March 14, 1975, we are submitting the enclosed document with accompanying volume of Exhibits.

We are also supplying a copy directly to Mr. Rubin of the Compliance Division of the Bureau of Consumer Protection.

Very truly yours,

J. Thomas Austern

encls

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Attachment A--Statement

SAME LETTER SENT TO ALL COMMISSIONERS

452-6130

March 17, 1975

Honorable Lewis A. Engman
Chairman
Federal Trade Commission
Washington, D.C. 20580

Dear Mr. Chairman:

For ten months, the undersigned have acted as co-counsel for the six cigarette manufacturers, in cooperating with the Compliance Division in the Bureau of Consumer Protection in the investigation of compliance with the six identical Consent Orders issued by the Commission on March 30, 1972, covering the inclusion of the statutory health warning in cigarette advertising and point-of-sale promotional materials.

In accordance with an agreement with the Director of the Bureau of Consumer Protection, we filed, on March 14, 1975, a Statement to Accompany Staff Report and Recommendations Concerning Past and Future Compliance.

For your convenience and to facilitate what we respectfully submit is necessary Commission consideration in depth, we are forwarding directly to you a copy of the Statement filed with a copy of the accompanying book of Exhibits.

It is perhaps unnecessary to elaborate the scope of the questions involved or their importance for the future both to these respondents and to the various media in which their advertising appears.

If the Commission determines that it would be helpful in its consideration, we respectfully request the opportunity to appear personally, formally or informally, before

the full Commission to furnish any supplementary information in connection with the settlement proposals advanced by the respondents and rejected by the Staff.

Respectfully submitted,

H. Thomas Austern

Horace R. Kornegay

Co-Counsel

encls
HTA/ceb

Attachment A--Statement

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Attachment A--Statement

STATEMENT

Introduction and Summary

> "Advertisements containing the disclosure statement in the format required by these orders began to appear in May of 1972, and by the end of October, all cigarette advertisements observed by the Commission staff were being published in accordance with the terms of these orders." (Federal Trade Commission Report to Congress, December 31, 1972, p. 4.)
>
> "And by October of 1972, almost all cigarette advertising published in this country was in compliance with the terms of consent orders issued on March 30, 1972, by the Commission against the six major domestic cigarette advertisers to require a black-on-white disclosure of the [warning] statement." (Federal Trade Commission Report to Congress, December 31, 1973, p. 1.)

Two transcendent factors should control the Commission's consideration of any recommendation by its Staff.

First is the public posture the Commission has taken toward the respondents' performance under the Order -- what the Commission has said and done and, equally important, what it has not said and done about that performance since July 1, 1972 -- and the respondents' reliance on Commission action.

Over a seven month period from July 1, 1971, to January 31, 1972, the Commission Staff negotiated identical novel, detailed, and sweeping Consent Orders. Those negotiations were closely monitored by the Commission itself. It had reviewed "mock-up" advertisements demonstrating alternative presentations of the statutory warning statement, and approved or

rejected various approaches which its Staff and the cigarette industry had developed.

On January 31, 1972, in announcing the identical Consent Orders, the Commission publicly noted that the six respondent companies made and advertised approximately ninety nine percent of all cigarettes sold in the United States. It had then announced that it would carefully monitor compliance with those Consent Orders.

Between May and October 1972, cigarette advertisements subject to those Orders appeared in weekly national magazines such as Time, Newsweek, and Life. Extensive cigarette advertising also appeared in the Washington Post and the Washington Evening Star in the same period. The format of those advertisements reflected the interpretations of the Orders which the Compliance Staff, two and a half years later, now rejects.

In August and September, 1972, the respondents filed Compliance Reports, each embodying representative advertisements and other materials indicative of the respondents' interpretations of the Consent Orders and their compliance. Those Compliance Reports likewise reflected the interpretations of the Orders that the Staff now rejects.

After reviewing those Compliance Reports, the Commission in December 1972 advised each of the respondents that "on the assumption that the information submitted is accurate and complete, . . . no compliance action by the Commission is indicated at this time."

On December 31, 1972, the Commission publicly reported to Congress, as noted above, that

> "Advertisements containing the disclosure statement in the format required by these orders began to appear in May of 1972, and by the end of October, all cigarette advertisements observed by the Commission staff were being published in accordance with the terms of these orders." (Federal Trade Commission Report to Congress, December 31, 1972, p. 4.)

On December 31, 1973, in its next Report to Congress, the Commission repeated that "by October of 1972, almost all cigarette advertising published in this country was in compliance with the terms" of the Consent Orders (Federal Trade Commission Report to Congress, December 31, 1973, p. 1).

Between March 1972 and April 1974, when the present investigation commenced, the respondents never received the slightest indication that the Commission was dissatisfied with their performance under the Consent Orders.

Nevertheless, the Compliance Staff now asserts six basic interpretations of those Consent Orders which, in its view, yield across-the-board industrywide past violations and control future compliance on all advertising of cigarettes. Hundreds of millions of dollars worth of advertising and promotional materials, both past and future, are encompassed by the Staff's newly developed interpretations.

Respondents submit, and this Statement demonstrates, that these new interpretations are erroneous and unwarranted.

They conflict with the explicit language of the Consent Orders. They distort what was agreed upon in the negotiations. They contradict the public recognition of the Commission to Congress that the respondents were in compliance. They repudiate the format for cigarette advertising that the Commission approved when it accepted the 1972 Compliance Reports. Some of these new and radical Staff interpretations now advanced for the first time were and are impossible of realistic application.

The second basic factor that must be considered by the Commission is the urgent need for complete and precise agreed clarification as to future compliance with the Order -- and the consequences, for both the Commission and the respondents absent that clarification. To that end, in their discussions with the Staff, the respondents have offered various accommodations which might help to settle the troubling problem of future compliance within the terms of the Order.

But settlement has been completely blocked by the position adamantly taken by the Commission Staff. It has refused to discuss any of the differing interpretations of the Order that must be clarified for the future. It has refused to consider in any fashion what forms of future compliance realistically could be achieved in accordance with the basic objectives of the Order. It has refused to comment on, indeed even to discuss, the suggestions advanced by respondents, and has refused to offer any alternatives of its own.

Instead, the Staff has taken the position that, before any clarification or accommodation for the future can be discussed, these respondents must come forward with a massive aggregate monetary offer as penalties for past "violations" of the Order -- determined on the basis of the new and erroneous interpretations which the Staff only now has advanced.

The Staff has refused to indicate its idea of a sufficient aggregate monetary offer, except to assert that it collectively must exceed $500,000 and also exceed the costs of litigation to the respondents.[1/] Even more, the Staff refuses to explicate how that aggregate is to be apportioned among the six respondents each of which is a different size company, utilizes different amounts of advertising in the various media, and advertises its brands in different advertising formats.

Moreover, the Staff has further refused to specify the particular advertisements of each respondent which, according to its new and erroneous interpretations, are claimed to have violated the Order in the past. Instead, it advances only general across-the-board interpretations of the Order which, in its view, have made and would for the future make entire

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1/ A former Assistant Director for Compliance who originally advanced this initial roadblock to settlement in the refusal to discuss specifics informally had suggested that respondents put on the table $6.3 million. This figure was later stated not to be controlling, but no specific aggregate amount, or amount per company, was advanced by the Staff.

categories of advertising in violation. The Staff insists that civil penalty actions, which it has indicated it will recommend, are "worth a great deal of money to the Commission."

Confronted with this andabatarian situation, respondents are submitting this Statement.

They respectfully insist that the issues raised must be reexamined in depth by the Commission itself. They also insist that the Commission scrutinize its public posture and its past statements to these respondents -- as they reflect both on the Commission's good faith and on the possible judicial response to any civil penalty litigation which may be brought.

The respondents further ask that their efforts over the last nine months, at an estimated cost of over $500,000, in cooperatively facilitating this investigation be weighed.

These are consent orders. They were not, as the present Staff interpretations would require, designed to curtail advertising in particular media -- be they newspapers, magazines, point-of-sale, or outdoor advertising. In applying these Orders to the <u>past</u> compliance of the respondents, it is important to bear in mind Mr. Justice Marshall's recent admonition that a consent order "must be construed as it is written, and not as it might have been written . . . ."[2/]

2/ United States v. Armour & Co., 402 U.S. 673, 682 (1971).

Paramountly, as to future compliance, the scope of what is involved dictates that there be realistic consideration of what can be done by agreed, precise compliance procedures within the terms of the Order -- without invading newspaper production techniques and intervening in newspaper economics, particularly in the ethnic press, or imposing upon respondents obligations with respect to other advertising media which they do not and cannot control.

The alternative of massive penalty actions would result in prolonged litigation that would tax the resources of the Commission. Further, if the Staff's actions are accepted by the Commission, respondents will have to weigh whether they will be able to rely in the future on positions taken by the then incumbent Staff and Commission or whether dealings with them should be on the basis of likelihood of litigation.

The Second Circuit has stressed that the "Federal Trade Commission Act is not a revenue-raising or penal measure," 3/ that "the basic objective of the Commission [is] not to exact penalties but to secure compliance," 4/ and that the "Commission's practices and rules [are] designed to promote voluntary compliance and avoid the rigors of litigation." 5/ Paul Rand Dixon,

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3/ United States v. St. Regis Paper Co., 355 F.2d 688, 693 (2d Cir. 1966).

4/ Id. at 696.

5/ Id. at 697.

then Commission Chairman, echoed these basic administrative policies when he assured Congress of the FTC's "dedicated effort to help businessmen, both large and small, to bring their practices into compliance with the law without resort to litigation." 6/

Litigated civil penalty actions against these respondents would represent a radical and troublesome departure from that philosophy.

In litigation, the Commission's past assurances to the respondents would raise serious and provocative questions concerning how far any respondent may act in reliance upon the Commission's public recognition that it is in compliance with its consent orders or other regulatory actions. Judge Friendly has forcefully observed that any

> "decision branding as 'unfair' conduct, stamped 'fair' at the time a party acted raises judicial hackles . . .. And the hackles bristle still more when a financial penalty is assessed for action that might have been avoided if the agency's changed disposition had been earlier made known, or might even have been taken in express reliance on the standard previously established." NLRB v. Majestic Weaving Co., 355 F.2d 854, 860 (2d Cir. 1966).

Moreover, litigation would pose the equally provocative question whether respondents who have been told that they

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6/ Testifying before the Senate Appropriations Committee, reported in 5 Trade Reg. Rep. ¶ 50,119 at 55,125 (1965).

are in compliance, who have displayed complete diligence and good faith in observing their obligations, and who have not in any respect injured the public should be subjected to anything more than nominal penalties.[7/] Indeed, Rule 3.61(e) of the Commission's Rules makes clear that penalties would not be appropriate.

To facilitate the required Commission examination of any Staff recommendations, this Statement will summarize the negotiation of these Consent Orders to explicate the understandings reached in 1971 between the then Staff and these respondents (with repeated interim and final review by the Commission) on each of the issues upon which the present Staff now asserts past violations and, without an initial aggregate offer of massive monetary penalties, refuses to discuss what can be done in the future.

It will then summarize the diligence and effort of the respondents in insuring compliance with the Order.

Finally, this Statement will analyze and demonstrate the patent errors in each of six theories that the Staff now urges as the basis for alleged past and future violations of

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7/ See United States v. The J.B. Williams Co., 498 F.2d 414, 438 (2d Cir. 1974); and United States v. American Greetings Corp., 168 F.Supp. 45 (N.D. Ohio 1958).

the Order.[8/] These were concisely summarized in an Aide Memoire for discussion of possible settlement presented to the Director of the Bureau of Consumer Protection on January 16, 1975. That document is part of the settlement proposals before the Commission, and for convenience is attached as Exhibit A.

Following is a catalogue of these inescapably complex and difficult issues:

On vending machines, we will show that the package display depictions on the machine display panel are exempt from carrying a warning statement under Section E of the Order, if they are covered by the Order at all; that, for vending machines, the Order applied prospectively; and that the respondents do not and cannot -- under this Order or otherwise -- "control" the thousands of local individual vending machine operators.

As to billboard advertising, we will show that the Staff's theory cannct be reconciled with the Order's precise specifications. Indeed, the present size warning statement conforms to the position first advanced by the Commission Staff during the 1971 negotiations.

8/ Both in the investigation of compliance, and in respondents' effort to explore the possibilities of settlement, the Staff has vacillated in the emphasis it places on each of the six newly advanced interpretations. We present them in the order of significance generally advanced in the final discussions on February 7, 1975.

As to point-of-sale materials, we will demonstrate that the Staff's indicated notions for measuring each POS piece clash with the Order's precisely negotiated directive that only the "advertising display area" must be measured.

On newspaper shrinkage (largely developed by extraordinary increases in newsprint costs wholly beyond the control of respondents), we will show that the respondents do not and cannot have responsibility under the Order for the production and printing practices of newspapers and that assumption of that responsibility might result in the diminution of much newspaper advertising, a result never intended by the Order.

As to newly advanced Staff notions on typography, we will show that the typesettings employed by the respondents are in full compliance with the detailed specifications of the Order, were known to and accepted by the Commission during negotiations, and result in a more readable warning statement than either the Order, strictly construed, or the Staff's new theories would require.

Finally, on foreign language advertisements, we will show that a foreign language warning statement is not required by the Order, but that the respondents, as the Commission acknowledged in its 1973 Report to Congress, have agreed that they will use, and are in fact now using, a reasonable translation of the warning statement.

In all of these areas, an examination of each actual printed advertisement or physical item is far more illuminating

than an adjectival Staff generalization. Civil penalty actions are not provable by generalizations. They require specific proof per magazine and newspaper advertisement, point-of-sale item, and other advertising material -- within the specifics of this novel Order and against the background of the Commission and respondents' actions since July, 1971.

Prolonged civil penalty litigation, which these respondents can and are prepared to defend, and which the stated posture of the Staff will require, would vastly tax the resources of the Commission. It would not advance the public policy or the objective to which the Consent Orders were directed.

In sum, the Commission Staff has submitted a report to the Commission charging that the respondent cigarette companies have violated the Consent Orders entered in 1972, and recommending that the Commission authorize the commencement of civil penalty actions.

We respectfully submit that the Staff's charges are without merit. We emphatically deny noncompliance with the Order. The respondents have complied to an extraordinary degree and in good faith with unprecedented Consent Orders of great complexity and novelty. The warning notice prescribed by the Consent Orders has appeared in millions of cigarette advertisements. Since 1970, the identical notice has appeared on cigarette cartons and packages pursuant to Federal statute. To anyone who reads, the warning statement has become indelibly associated with cigarettes.

As we shall demonstrate in this Statement, the Staff's charges relate in the main to technical, esoteric points on which the respondents have a strong position based on the plain language and background negotiation of the Consent Orders. The litigation advocated by the Staff would be enormously burdensome on all of the parties, it would be protracted, and, more importantly, even if the Commission should prevail, there is no assurance that it would resolve the Staff's problems that have emerged during the current investigation.

In discussions with respondents, the Staff has taken the position that it will not even discuss resolution of outstanding questions under the Consent Orders until the companies have first agreed to pay in the aggregate tremendous sums of money in settlement of alleged violations of the Orders.

The respondents cannot agree to that procedure because it offers no assurance that the very problems which have given rise to the present controversy would not immediately recur.

We respectfully urge the Commission to refuse to authorize the commencement of civil penalty actions, or, in the alternative, to remand this matter to the Staff with a directive first expeditiously to discuss a settlement of outstanding issues regarding the Consent Orders, and if an accord can be reached on these points, thereafter to discuss appropriate disposition of any charges of alleged noncompliance.

I

The Negotiation Of The Consent Orders

On July 1, 1971, the FTC served on the six respondents proposed complaints which charged that their failure to disclose clearly and conspicuously in their advertising the statutory health warning was a deceptive practice prohibited by Section 5 of the FTC Act.[9/]

Accompanying the draft complaints was a proposed order under which the respondents would be required to cease and desist from all advertising which did not clearly and conspicuously disclose the Surgeon General's health warning as specified in the Public Health Cigarette Smoking Act of 1969.

The proposed orders did not define "clear and conspicuous disclosure." They merely recited that

> "The Commission, upon development of full record facts in a litigated proceeding, will determine what constitutes clear and conspicuous disclosure with respect to the health hazards of cigarette smoking."

The respondents were offered a six month period within which to negotiate settlements of the proposed complaints.

9/ Since four of the companies had, on a voluntary basis, already been including the Surgeon General's warning in some of their advertising, the complaint against them charged that their presentation of that warning did not constitute "clear and conspicuous disclosure." Against the two respondents who had made no disclosure at all, the Commission charged both a deceptive practice and an unfair method of competition vis-a-vis the other companies that had been utilizing the Surgeon General's warning. See letter of June 24, 1971, from Chairman Miles W. Kirkpatrick to Honorable Carl Albert, Speaker of the House.

To facilitate negotiations, the six respondents were represented by the present two co-counsel. The Staff negotiators included Messrs. Pitofsky, Thain, Brauninger, and Powers.

At the outset, the Commission Staff and counsel for the six respondents agreed that it would be imperative to particularize what clear and conspicuous disclosure would require and to provide concrete specifications for the presentation of the statutory warning statement in advertising.

As negotiating discussions progressed, they were closely monitored by the five Commissioners, who, on a number of occasions, reviewed "mock-up" advertisements illustrating alternative advertising presentations of the statutory health warning statement and approved or rejected the tentative approaches with which the Staff and the industry came forward.

The detailed history of the Order's negotiation is carefully preserved in the files of the respondents and, presumably, in the files of the Commission as well. These sources reveal with unquestionable clarity the areas in which the Staff and the respondents at first disagreed, the formulas which were developed to resolve those differences, and the understandings which emerged on the scope and intent of the different provisions of the final Order.[10/]

10/ The negotiators were under pressure to meet a January 1, 1972, deadline. Since discussions about the definition of a clear and conspicuous disclosure for print advertisements in
(cont'd)

The negotiators initially focused on the definition of clear and conspicuous disclosure for newspaper and magazine advertisements. The Staff's first proposal, unveiled on August 9, 1971, contemplated an octagonal-shaped warning statement, to be printed in black against a white background, which would occupy a fixed area of 10 to 12 percent of the total advertisement.

The industry's counterproposal, first presented on August 9, 1971, contemplated that the warning statement text would appear in two lines and would be framed in a ruled rectangle. That proposal was patterned on the warning statement which, since May 1971, had been formulated by The New York Times for its cigarette advertising. The type size of the text would be either 8, 10, 12, or 14 pts., depending on which of four size categories into which the overall dimensions of each advertisement would fall.

The distance -- or "leading" -- between the two lines of the text and the spacing between the text and the ruled rectangle would likewise vary in accordance with those four size categories. The basic approach that the industry counterproposal reflected, as well as much of its language, was later to be adopted as Section C of the final Order.[11/]

(cont'd) magazines and newspapers (where the overwhelming bulk of advertising appeared) took until early December, negotiation of the remaining issues under the Order was compressed into the month of December.

11/ The final Order is attached as Exhibit B.

The Staff advanced two difficulties with the industry's counterproposal: the warning statement it provided for was considered too small, and it would not invariably appear in black against a white background. Ensuing discussion centered on those two points.

On September 28, 1971, the Staff and the industry made a presentation to a group of Commissioners, including Chairman Kirkpatrick. The Chairman intimated that the industry's rectangular format for the warning statement might prove acceptable if the warning statement were enlarged and if it appeared in black against a white background. The Chairman also requested the opportunity to compare the mock-ups that the industry had prepared to illustrate its own proposal and the proposals of the Staff. On September 30, those were transmitted to him.

On November 12, 1971, the industry agreed to present the warning statement in black against a white background but declined to increase the warning statement's size. (Respondents at that time requested but were not afforded an opportunity directly to present their views to the Commission.) Instead, on November 15, the Staff made a further presentation to the full Commission, and the Commission again reviewed mock-ups -- now in the black-on-white format -- illustrating the industry's proposal. The Commission reportedly expressed its readiness to accept the proposal if the warning statement were increased four

points for each size category of advertisement. The industry agreed to an increase of two points and, at a meeting on December 3, 1971, the Staff reported that this increase was acceptable to the Commission.

From the December 3, 1971, session forward, the negotiators began focusing on the remaining provisions to be included in the Order.

One of the first subjects addressed by the negotiators was the proper format for the warning statement on billboards. At the very outset, Mr. Pitofsky indicated his position that it was unnecessary and impracticable for the billboard warning statement to be readily readable by passing motorists. He agreed that it would be sufficient if the warning statement were noticeable to a pedestrian walking past the billboard. In accordance with Mr. Pitofsky's position, the respondents prepared a mock-up of a warning statement for a 30-sheet billboard in which the warning statement lettering was two inches in height. On December 9, 1971, the Staff viewed this mock-up and expressed its satisfaction with it. The specifications embodied by that mock-up were adopted and are now contained in Section D of the Order.

On December 3, 1971, the respondents expressed their fear that newspaper and magazine production practices beyond their control might cause defects in the appearance of the warning statement. The Staff acknowledged this danger and,

accordingly, a provision was drafted shielding the respondents from responsibility for "blurring or illegibility" of the warning statement occurring because of the printing techniques used by publications. That provision is now Section C.8 of the Order.

The problem of newspaper shrinkage, which has engrossed the Staff in its current investigation, was never mentioned during the negotiations and was unknown to those representing the respondents in the negotiations.[12/] Had it been, it would have been clearly stated within the exception for printing production techniques used by publications and obviously beyond the control of respondents.

Mr. Pitofsky also indicated on December 3, 1971, that the warning statement should only appear on large point-of-sale (POS) promotional pieces with cigarette "advertising display areas." To reflect this position, it was eventually decided that only POS pieces whose "advertising display area"

12/ During its investigation, particularly in its inquiries of company and agency personnel, the Staff has extensively pursued the question of knowledge of shrinkage at the time of the negotiations. In a few instances, general background knowledge of earlier so-called newspaper mat shrinkage was indicated on the part of some production employees in advertising agencies. Current newspaper shrinkage is largely the result of economic pressures on newspaper publishing (infra, pp. 52-53). Cardinally, however, the specifics of newspaper mat shrinkage were unknown to the respondents' negotiators of the Order. Neither newspaper shrinkage nor its implications with respect to the Order were discussed during the negotiations.

exceeded 36 square inches would be required to exhibit a warning statement. That "36 square inch" requirement is now contained in Section E of the Order.

Late in December, 1971, the respondents emphasized the need to provide realistic lead times during which they could begin the extensive process of conforming their advertising to the Order. They also emphasized the need to determine to which media the Order would apply retrospectively and for which media its application would be prospective. The result of those concerns was the drafting of the timetable governing the Order's operation that is now Section G of the Order. At the time that section was adopted, both the Staff and the respondents clearly contemplated that, for POS pieces, the Order would apply only prospectively and that the respondents would not be required to search out POS pieces already in place and display the warning statement on them.

In the final stages of negotiation, a comprehensive provision which would have measured all advertising against an overall clear and conspicuous standard, independent of the Order's detailed requirements, was proposed by the Staff and rejected. The ground for its rejection was that it would defeat the Order's underlying approach to specificity.

It is again worth noting that the possibility of newspaper shrinkage was never mentioned during the negotiation of the Order. Nor did the negotiators ever discuss displaying the

warning statement on cigarette vending machines. As a result, vending machines are not mentioned in the Consent Order.

By mid-January 1972, the final drafts of the Commission's complaint, the respondents' answers, the Consent Agreement and the Order had been circulated to the six respondents and the Staff and had been approved. On January 31, the Commission announced its provisional acceptance of the Consent Agreement and Order and permitted the public until February 29, 1972, to offer its comments. The Consent Agreement and Order were formally issued by the Commission on March 30, 1972.

On April 21, 1972, Mr. Egan of the Commission's Compliance Staff wrote to the six respondents to request that they transmit reports of their compliance with the Order. In early May, present counsel met with Mr. Pitofsky, Mr. Egan, and Mr. Powers and pointed out that, in view of the necessary lead times established in Section G of the Order, the submission of full compliance reports at that time was premature. Mr. Pitofsky agreed. Accordingly, the respondents deferred transmitting their compliance reports until late August and early September. In late December of 1972, the Commission advised each of the respondents that "on the assumption that the information submitted is accurate and complete, . . . no compliance action by the Commission is indicated at this time." [13/] As Exhibits D,

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13/ The full text of the Commission's letters to the respondents is attached as Exhibit C.

E, F, and G illustrate, the attachments to the respondents' compliance reports specifically revealed virtually all of the interpretations and methods of compliance with the Order now challenged by the Staff.[14/]

Finally, a word about this investigation is necessary: In April, 1974, when this investigation began, respondents requested co-counsel, who had acted for them in negotiating the Consent Order, fully to cooperate with the Compliance Staff in obtaining documents and facilitating desired interviews. Those embraced, over a six month period, sessions with eighty representatives of some seventeen advertising agencies and of the six respondent companies. For convenience and minimization of expense to all concerned, many of those interviews were held in Washington. In addition, the files of each advertising agency were examined and duplicated for submission to the Staff. Thousands of magazine and newspaper advertisements, to the extent obtainable, were similarly submitted. Extensive vending machine materials were obtained and submitted. All of those materials were catalogued and identified. Absent that program

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14/ Exhibit D, from the Brown & Williamson compliance report, reveals the present size warning statement on billboards. Exhibit E, from the Philip Morris compliance report, reveals the respondents' application of the Order, for point-of-sale items, prospectively. Exhibit F, from the Liggett & Myers compliance report, reveals the typesetting of the warning statement embodied by the Standard Acetate. Exhibit G, from the Lorillard compliance report, reveals the problem of newspaper shrinkage, over which respondents had no control.

of cooperation, this investigation would have been greatly prolonged and would have been far more difficult and costly for the Commission. It is estimated that in excess of $500,000 in expenses have been incurred by the respondent companies.

II

The Respondents' Diligence In Observing The Order

The Commission's Order in Docket Nos. C-2180 through C-2185 is a uniquely intricate document. It regulates in minute detail virtually every aspect of the presentation of the statutory health warning statement in advertising.[15/] In addition, the requirements of the Order vary both for different size advertisements and for the many different advertising media which the respondents employ.[16/] Considering the novelty of the Order's approach, the time pressures under which it was drafted, and the scope and technical nature of its subject matter, it is hardly surprising that some of its technical provisions are deemed by the present Compliance Staff to have been

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15/ E.g., the type size (C.2), type style (C.3), and color of its text (C.5); the positioning of the lines of that text (C.2) and of the ruled rectangle surrounding it (C.4); the color of the background against which it is set (C.5); and both the portions of the advertisement in which it may appear (C.7) and the elements of the advertisement which it may or may not immediately adjoin (C.6 and C.7).

16/ E.g., newspaper and magazine ads (Section C), point-of-sale promotional pieces (Section E), billboards (Section D), transit cards (Section D), and paperback book inserts (Section F). The Order is, however, an integrated whole.

imperfectly articulated and thus to pose a few problems of interpretation and execution.

The respondents are among the nation's largest advertisers in the categories of media covered by the Order.[17/] For extensive advertisers like the respondents, the preparation of an individual advertisement -- not to mention an entire campaign -- is not a simple undertaking. It entails consultation between different departments of the company as well as between the company and its advertising agencies; and the transmission of information and materials to and from the company and its advertising agency, and from its agency to those who prepare production materials and then to publications. Overall, the participation of many dozens of people from several different organizations is required. To insure that each advertisement contains a warning statemer and that each warning statement conforms to the requirements of the Order has therefore been a demanding task.

The respondents have been fully cognizant of their responsibilities under the Order. They each have promptly set out to acquaint their employees and the employees of their

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17/ According to the August 26, 1974, issue of Advertising Age, during 1973 the six respondents were all among the nation's fifty leading advertisers as measured by their media expenditures.

advertising agencies with the requirements of the Order.[18] They each have developed painstaking procedures for monitoring an advertisement, as it is circulated at different levels of the agency and the company, to insure that it contains a warning statement and that the warning statement is the proper size and format.[19] In some cases, the respondents have directed the destruction of advertising production materials that predated the Order so that there would be no risk that those materials might be accidentally employed.[20] In other cases, the respondents have made extensive efforts to inform publications of the requirements of the Order so that each advertisement they printed would contain a warning statement.[21]

Considering the propensity for "human error" that is always present in so complex an enterprise, it is indicative of the respondents' diligence that the health warning statement has appeared in thousands of newspaper and magazine advertisements, and hundreds of POS pieces, billboards, and transit cards that the respondents have produced since the Order became effective.

18/ Exhibit H reveals the compliance efforts of American Brands, Brown & Williamson, Lorillard, and Liggett & Myers to inform their employees of the Order's requirements.

19/ Attached as Exhibit I are the procedures of Philip Morris, R.J. Reynolds, and Lorillard for this purpose.

20/ See Exhibit J from American Brands.

21/ See Exhibit K. Repeated photocopying introduces minuscule differences in these reproductions.

And it is equally indicative of their diligence that, on those infrequent occasions when the warning statement has been omitted because of a publication's error, the respondents have promptly demanded an explanation and definite assurance that the incident would not recur.[22/]

Apart from its generalized, across-the-board interpretations of the Order, the Staff has not specified the number or identity of particular advertisements that in its view are violative of the Order. Yet both administratively and judicially, the overall compliance record of a respondent is of critical importance. Respondents submit that any realistic appraisal of their performance since the Order became effective will demonstrate substantial and diligent compliance with its provisions.

There is no evidence detracting from the respondents' record of diligence. The legal interpretations of the Order that, at various times since 1972,[23/] the respondents have

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22/ See, e.g., Exhibit L.

23/ In April and May of 1972 and January of 1973, present co-counsel distributed a set of "Guidelines" to various provisions of the Order. On June 5, 1972, representatives of the six respondents met to adopt a uniform interpretation of the typographical requirements of Section C. The result of that meeting was the distribution of the "standard" acetate or "transparent overlay" that the respondents have been employing since that time to govern the typesetting of the warning statement for the four basic type sizes contained in Section C. On August 29, 1972, representatives of the respondents met to consider the adoption of a "standard overlay" or "acetate" for large POS pieces.

adopted reflect not improper conduct to evade the Order but a forthright effort to formulate a common policy on issues of compliance that each respondent had found complex and difficult. It was exactly such a uniform reading of the Order that Mr. Pitofsky -- recognizing the intricacy of the Order and the many interpretive problems it posed -- had urged adopting during its negotiation.

III

The Staff's Six Asserted Industry-wide Violations Of The Order

Toward the close of its investigation, the Staff has asserted that six of the industrywide interpretations of the respondents constitute violations of the Order. In the following discussion, we will endeavor to summarize the Staff's theories and to present our responses to them.[24/]

On each point, we submit and will demonstrate that the respondents have conformed both to the letter of the Order and to its intent, as manifested by the consensus that evolved between the Staff and the respondents during negotiations. More important, however, even assuming arguendo that the

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24/ The Staff has also asserted that a number of particular practices of individual respondents violate the Order. While we disagree with the Staff on each of these points, this Statement is limited to the asserted violations common to all six respondents -- especially since these violations clearly constitute the heart of the Staff's case in its present posture.

respondents have erred in their reading of the Order, we submit that their purported violations have not detracted from the realization of the Order's overriding goal -- the presentation to the public of the statutory warning statement as directed by the Order. Accordingly, a basic precondition for the imposition of substantial penalties -- some injury to the public -- is entirely absent.

Moreover, again even assuming arguendo that respondents have not in a few instances complied with the terms of the Order, it is evident both from the nature of the six purported violations and from the overall diligence with which the respondents have approached the Order that any such incidental noncompliance has been inadvertent, and not the product of any bad faith. Thus, another precondition for the imposition of substantial penalties -- an intent to evade the Order -- is also entirely lacking.

A. Vending Machines

For several years, respondents have contracted individually with an organization known as POP Associates for depictions of packs of their various brands to be put on the front display panels of cigarette vending machines. Not all cigarette vending machines have a front display panel containing package depictions. Some are merely labeled "cigarettes" or contain some other design or format. POP is the agent for the several vending machine manufacturers, and arranges with

those manufacturers for package depictions to be prepared and mounted on vending machine panels during production of the machines.

Typically, the front panel, usually on the machine top, has contained four separate package transparencies or depictions, illustrating the brands of either three or four different respondents. Virtually all of the individual package depictions delivered in final form to the production house since July 1972 have been smaller than 36 square inches. In addition, each individual depiction uniformly has been "framed" -- i.e., visually segregated from the others so that it would appear to the cigarette purchaser as a distinct display.[25/]

No provision of the Order requires a warning statement on cigarette vending machines. Nor was such a requirement ever discussed during the negotiation of the Order. Nevertheless, assuming arguendo that vending machine display panels are at all covered by the Order, they may fit within the category of "point-of-sale (POS) promotional materials exhibited to cigarette purchasers" and, if so, would be governed by Section E of the Order. Under Section E, an advertisement on a POS piece must contain a warning statement only if it has "an advertising display area of more than 36 square inches."

25/ Attached as Exhibit M is a photographic representation of a vending machine display panel.

The Staff contends that, under Section E, a warning statement must appear on all vending machine panels that contain separate package depictions. The Staff's theory evidently is that, even though each depiction of a separate brand of a separate respondent is smaller than 36 square inches, the panel as a whole constitutes a "single advertisement" for cigarettes, and therefore the display area of the separate package depictions and of the background for the panel must be aggregated in order to determine whether a warning statement is necessary.

The Staff advances an additional theory with respect to the package depictions on vending machine panels. It contends that on all such panels whose package depictions went to the printer at any time before July 1972 -- including those that were installed on hundreds of thousands of vending machines years before the Order took effect -- a warning statement is required if the respondent maintains "control" over the machine. That "control" exists, contends the Staff, whenever the respondent makes any payment to the operator of the machine for stocking the respondent's brands in the machine's slide columns.[26/]

26/ There are as many as thirty six columns in vending machines. Machine manufacturers typically sell their machines to vending distributors who in turn sell those machines to vending "operators" or "vendors." Most vendors are large regional or national organizations that own many thousands of vending machines. The vendor's employees regularly service the machines by stocking them with merchandise and by removing cash from the coin box. Vendors do not always purchase cigarettes from the respondents but instead from cigarette wholesalers. Nevertheless, to insure effective distribution of

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When the respondents make these column stocking payments, it is argued, they possess sufficient leverage over the operator to require him to place the warning statement on the machine panel.

We submit that neither of the Staff's theories can be sustained.

(1) Each Vending Machine Panel Contains Four Separate Package Depictions, Each Of Which Is Entitled To Section E's Exemption For POS Pieces Smaller Than 36 Square Inches In Advertising

For the entire vending machine panel to constitute a single advertisement for "cigarettes," one would expect that the panel formed a common aesthetic unit; that the respondents had cooperated with each other in preparing and financing the panel; and that the panel as a whole served the common commercial objectives of each of the respondents. Yet none of these is in fact the case.

The different package depictions on the panel are not integrated into a common presentation. The panel is designed so that each depiction will be an independent display. On some of the machine panels, the background over which the packs are superimposed is blank. No effort has been made to create a

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(cont'd) their brands, each of the respondents offers to contract with vendors, who wish to participate, for the payment of small sums per column per machine in return for the vendor's efforts to stock some of its brands in the columns of that machine.

background motif which would link each pack to the others. Moreover, on virtually all machine panels printed in final form since July 1972, the pack depictions are framed -- in some way set within a border that underscores each pack's independence. The net impact of the framing is to present to the consumer four separate pack depictions.

The independence of each package depiction is also underscored by the fact that each respondent agrees to pay POP only for the depiction of its brands and not for the space to be occupied by the other respondents' brands.

Significantly, POP, which accepts payment from the individual respondent in exchange for its commitment to arrange space, does not serve as the agent for all the respondents, acting collectively. Instead, as its contracts with each of the respondents state, it is the agent for the different machine manufacturers that prepare and install the package depictions.[27/] Consequently, the individual respondents have no control over the depiction of other respondents' brands or the common background for the entire panel. Each respondent reviews and approves the art work for its own depiction in advance of final

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27/ POP's President and Chairman of the Board are former employees of a leading machine manufacturer. Before POP's formation, in 1968, each respondent, on an individual basis, negotiated for package depictions directly with the individual machine manufacturer.

production, not those of other respondents nor the entire panel proof.

Beyond these considerations, the basic flaw in the theory that the panel constitutes a single advertisement is the premise that the respondents have some interest in depicting or promoting their competitors' brands, and, therefore, that they would undertake to sponsor a joint marketing activity. Yet it is plain that the respondents do not purchase depictions on machine panels or anywhere else to promote "cigarettes" generally. Their objective is to promote their own specific brands. As a result, they have no incentive for, and an obvious incentive against, any common venture in which their own expenditures would persuade the consumer to patronize a competing respondent's product.

(2) The Staff's Theory Of Control Disregards Section G Of The Order, Which Exempts From The Requirement Of A Warning Statement POS Pieces That Went To The Printer In Final Form Before July 14, 1972

Section G was included in the Order to achieve two objectives: First, to assure the respondents of adequate lead time to conform their advertising to the Order's requirements; and, second, to provide for POS materials and for certain other media that the Order would operate prospectively -- i.e., that the respondents would not be required to search out POS items long since placed in retail establishments and other points of purchase and to display a warning statement on them. Moreover,

the vast majority of point-of-sale promotional materials turn over in short periods, usually six weeks, and are then destroyed. These objectives were clearly understood by the Staff and the respondents during the negotiations.

Section G begins by stating the general principle that the Order "shall become effective sixty (60) days after it is finally issued" (i.e., May 30, 1972). It then provides a specific timetable for the Order's application to each of the different advertising media which the Order covers. Subsection (d) sets forth that timetable for POS items as follows:

> "The requirements of [the Order] shall not be applicable to . . . point-of-sale promotional materials . . . delivered in final form to the printer less than forty-five (45) days from the date this Order shall become effective" (i.e., July 14, 1972).

What this language provides is plain and what it does not provide is equally plain. It does not provide that POS pieces delivered to the printer in final form before July 14, 1972, have to contain a warning statement. Nor does it provide that only POS pieces delivered to the printer in final form between May 30 and July 14, 1972, but not those delivered before that period, are alone exempt from the coverage of the Order.

What subsection (d) does provide, unambiguously, is that for POS items, the requirement of a warning will apply prospectively, with only POS pieces delivered in final form to the printer after July 14, 1972, included in its coverage.

It is significant that when the drafters of Section G desired the inclusion of a warning statement in advertising or promotional material in place before the Order, they expressed that goal in explicit language. Subsection (b) provides a 180-day lead period for billboards put into production before July 14, 1972, but as to all billboards, requires the warning statement after that lead period has expired. Subsection (c) provides a similar lead period (140 days) for paperback book inserts and other non-POS items but, again, requires a warning statement on all such items once the lead period is over. The absence of a comparable requirement for POS items means that those items in place before the applicable date are exempt from carrying a warning statement.

(3) The Respondents Do Not Exercise Control Over The Vending Machine Operator

It is hard to fathom the Staff's meaning when it asserts that the respondents "control" the vending machine operator.

The sums which the respondents offer to vending machine operators for column merchandise stocking are not indirect payments for the display panels which their machines may include. For it is clear that those "stocking" payments are strictly distributional in purpose. They are offered as an inducement for the operator to maintain the respondents' brands

in his machine -- not as consideration for any cigarette package depictions on the machine panel.[28/]

Nor can the Staff mean that the respondents have some power over the body of the vending machine. It is clear that the body of the machine, as well as the merchandise stocked within it, is the property of the operator and that any tampering by the respondents with the machine or its contents would be improper and illegal without the operator's consent.

Perhaps the Staff contends that "control" over the operator exists because of some "dependence" on the respondent which the operator has by virtue of a column stocking contract with the respondent. Yet here, too, the Staff's theory is contradicted by the facts. The revenues which an operator derives from his stocking contracts are far too small to make the operator beholden to the respondent who pays them.[29/] Moreover, the competition among the respondents to induce operator participation in each respondent's stocking program is acute; the number of different brands available for stocking greatly

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28/ For example, it is significant that a respondent may make column stocking payments to an operator even though the operator's machine may not possess panels depicting a respondent's brands. Frequently, the opposite may also be the case -- a machine panel may depict a respondent's brands but the respondent will have no stocking arrangement with the machine operator.

29/ A typical column stocking contract, for example, would result in the payment of $3 to $6 a year per machine.

exceeds the number of columns contained in most vending machines. For this reason, it is groundless to expect that a respondent can dictate the terms of a stocking contract to an operator and that the operator has no choice but to acquiesce.

If an operator refused to display a warning statement o. the panel of his machine, there is no legal or informal sanction that, realistically, the respondent could impose on him. Given the absence of any sanction, the respondents -- under this Order or otherwise -- cannot possibly be responsible for the operator's failure to place a warning statement on his machine.

B. Billboards

The Staff position, if insisted upon, could make impossible the continued use of billboard advertising. Billboard advertising was recognized, and foreclosure of that medium was plainly not intended in the formulation of the specific provisions of Section D.

Section D of the Order specifically prescribes the size of the warning statement to be employed on billboards. For each of the standard sheet sizes for billboards, the section specifies that the size of the warning statement shall be "not less than" a specified height and that the remaining dimensions of the warning statement shall be proportionalized to those prescribed by Section C.

Seizing upon the phrase "not less than," the Staff suggests that the sizes for billboard warning statements

contained in Section D do not control whether a billboard warning statement complies with the Order. Even though the specified sizes have been employed, the Staff argues that the warning statement must still be tested against some undefined clear and conspicuous standard. Measured against that notion -- whatever it may provide -- the Staff concludes that the vast majority of billboard warning statements must be deemed violative of the Order since they are not readily readable by drivers and passengers of passing automobiles.

First of all, there is nothing in the Order to suggest a specific, objective test for "clear and conspicuous disclosure" in some advertising media but an unspecified, amorphous, subjective test in others. Indeed, Section C of the Order is clear in stating that its definition of "clear and conspicuous disclosure" is not limited to that section but operates "for the purposes of this Order." Portions of Section D tie in with Section C.

By invoking a standard of clear and conspicuous disclosure divorced from the Order's detailed specifications, the Staff's approach would defeat the cardinal objective that, from the very outset, the Order's negotiators agreed that it was designed to accomplish -- the particularization of clear and conspicuous disclosure into precise guidelines not subject to constant and continuing dispute and controversy. Significantly, during the negotiations, a provision containing exactly the

"catch-all" clear and conspicuous standard now advocated by the Staff was proposed and rejected.

Any realistic understanding of billboard advertising, as recognized during the negotiations, must comprehend that each billboard may present an individual problem as to what can or cannot be seen on it under its particular placement and conditions. Billboards are of varying sizes. They are placed, and often required by law to be erected, at varying distances from highways. They occasionally appear on the roof or sides of buildings. Some are painted and some are paper applied in so-called preprinted segmented sheets.

Every billboard now contains a rectangle embodying the warning statement. It is an additional reminder of the now well-known warning statement appearing on every cigarette pack, on every carton, and in every cigarette advertisement.

Second, the Staff's rationale for concluding that the warning statement on billboards is not clear and conspicuous -- that it is not readily discernible to passing motorists -- was expressly repudiated by the Commission Staff members who negotiated the Order. From the beginning of negotiations, the imponderables involved in viewing billboard advertising made it possible that the warning statement might not be read by drivers and passengers of passing automobiles. It would be sufficient, it was emphasized repeatedly, if a pedestrian, walking directly in front of the billboard, could take note of the warning statement.

To embody the agreed upon approach, the respondents prepared a mock-up billboard with a warning statement and exhibited it to the Staff. The Staff indicated that the warning statement on that mock-up was acceptable. The specifications for the warning statement on the mock-up duplicate precisely the specifications for billboards that are now contained in Section D of the Order.[30/]

Once again, it is imperative that this Order be interpreted as it was written and as it was understood by those who negotiated it -- not as the Compliance Staff, two years later, believes it should have been written. Measured against the agreed language and the intent of the Order, the presentation of the warning statement on billboards is beyond challenge in compliance.

C. Point-Of-Sale Materials

The Staff asserts that a number of the respondents' POS pieces contain a smaller warning statement than the Order requires.[31/]

30/ The mock-up was of a 30-sheet billboard. The lettering of the warning statement was two inches in height. Section D provides that "On billboards of a size 24-sheets and larger, the type size of the warning statement shall be not less than two inches in height."

31/ The Staff has declined to identify or to quantify the number of POS pieces that it believes fall into this category. It has, however, indicated various percentages -- anywhere from 0 to 50% -- representing the share of each individual respondent's POS pieces that, as viewed by the Staff, purportedly contain a warning statement that is too small.

As the Staff evidently recognizes, Section E of the Order requires that the size of the warning statement on a POS piece must be determined by "proportionalizing" the "advertising display area" of that piece to the basic advertisement sizes prescribed by Section C. For example, a POS piece whose "advertising display area" was 50 square inches would, under Section C, require a 10-point warning statement. The Staff's quarrel with the respondents centers on some of the respondents' methods of measuring the "advertising display area."

First, the Staff suggests, on racks for the counter or floor display of merchandise, the respondents have excluded from the "advertising display area" the merchandise stocking area occupied by stacked up cigarette packs and cartons. And, second, the Staff suggests, the respondents also have excluded from the "advertising display area" all space which is not used expressly for cigarette advertising. That space would include a nonadvertising functional surface used, for example, as a plastic change mat by the retailer,[32] and surfaces containing noncigarette advertising copy -- for example, the message "Come Again" or "Thank You."[33]

32/ Exhibit N is an example of such a change mat.

33/ Exhibit O is an example of a POS piece with the message "Thank You."

The Staff's contention might have some force if the Commission had specified the overall surface area of the POS piece as the basis for determining the proper size warning statement. The specific test selected, however, was the "advertising display area." Apart from whether large POS pieces may attract the purchaser's attention, the criterion under the Order is the area occupied by cigarette advertising. That area cannot comprehend space employed for noncigarette advertising purposes -- whether those purposes are to provide merchandise stocking, to provide a convenient surface to assist the retailer in conducting his change transactions, or to convey, on the retailer's behalf, a message of thanks to the purchaser for patronizing his establishment.

There is a further flaw in the Staff's position that merchandise stocking racks for the counter or floor display of stocks have been improperly measured. Cigarette packages and cartons are already required to display the Surgeon General's warning by the Public Health Cigarette Smoking Act of 1969. The Staff ignores the Act, and the warning it mandates, by making the area occupied by packs and cartons the basis for an additional warning -- this time in the merchandise stocking stacks in which packs and cartons are placed.

Had any of these minor questions been initially presented, these unquantified Staff assertions about POS material might have been discussed in 1971. But the key criteria --

that point-of-sale items under 36 square inches were not to be covered and, specifically, that the controlling measurement would be the "advertising display area" -- were fully discussed and canvassed in the negotiations of the Consent Order. Unilateral and belated new interpretations cannot be justified. Nor can they be made the basis for generalized charges of noncompliance in this particular area.

Finally, it is important to remember that the disputed issue as to the vast majority of these POS pieces is not whether a warning statement is present but whether that warning statement is sufficiently large. To set that issue in proper perspective, we emphasize that, even were the Staff's new theories correct, it would be necessary to increase the warning statement size on the POS pieces in question no more than four points. Considering that a point is equal to 1/72 of an inch, it is questionable how important the asserted differences are to be regarded.

The Staff refused to discuss our suggestions for future compliance which would have eliminated many of these insignificant objections. See Exhibit A, pp. 35-36.

D. Typography

For each of the four basic categories of advertisements, Section C of the Order spells out the requisite dimensions of the health warning statement -- the style and size of the type, the spacing or "leading" between the two lines of

type, and the positioning of the ruled rectangle surrounding the text. Since June of 1972, the respondents have employed a "Standard Acetate" or transparent overlay to govern their compliance with Section C.[34/]

The Staff now asserts that this Standard Acetate departs from Section C in two respects: First, the "leading" between its two lines is said to be smaller than C.2 requires. This is so, contends the Staff, because the prescribed distance between the two lines -- the "x-height" or lower case height of the particular type size employed -- has not been measured from the "shoulders" of each line of type. And, second, the vertical "spacing" between the "type block" and the ruled rectangle is said to be smaller than C.4 requires. The Staff urges, as a result of its allegation, that <u>every</u> advertisement and point-of-sale item over the past two and a half years was in violation -- and massive penalties can be demanded -- because the prescribed spacing -- the particular type size employed less two points -- has not been measured from the "shoulders" of each line of type.

34/ The Standard Acetate is submitted as Exhibit P. The illustrative advertisements submitted with the Compliance Reports, and which were before the Commission when it made its representations to Congress in 1972 and again in 1973, were based upon the Standard Acetate and embodied the respondents' interpretation of the Order's requirements as to typography. Similarly, the thousands of advertisements appearing nationally and locally through 1973 embodied the same interpretations.

To illustrate its contentions, the Staff has prepared what it terms its "Literal" -- a typesetting of the warning statement that embodies its notion of the requirements of Section C.[35/] The respondents, in turn, developed their Literal, which is a strict interpretation of Section C and, in addition, illustrates that the industry "Standard Acetate" is a substantially more generous rendition of the warning statement than Section C requires.[36/]

(1) The Staff's "Literal" Is Not A More Noticeable Rendition Of The Warning Statement Than The Industry Standard

Before indicating why we insist our typographical interpretation of C.2 and C.4 must prevail, we think it instructive to compare these three typesettings -- the "Industry Standard" and the two Literals -- in order to show how inconsequential their differences are in fact.

First, as Exhibit S demonstrates, the differences between the Staff's and the industry's methods for measuring leading and spacing between the lines are minuscule and in no case exceed more than six or seven points. (A point is equivalent to 1/72 of an inch.)

Second, leading and spacing do not affect the width of the warning rectangle and, indeed, in the 10 and 12 point

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35/ The Staff's "Literal" is submitted as Exhibit Q.

36/ The Industry Literal is submitted as Exhibit R.

sizes, the Industry Standard is wider than the Staff Literal by 9 and 3 points, respectively. Moreover, looking beyond the width and depth of the warning rectangle to its overall area, it becomes evident that the Industry Standard and the Staff Literal are virtually indistinguishable. Exhibit T illustrates this vital point.

Third, the way in which the text within the rectangle is set by the spacing between letters and words is surely far more important in arresting the reader's attention than the dimension of the rectangle. Section C is silent on this critical subject, thus permitting the respondents, had they so desired, to compress the words and letters of the warning to what is known to typographers as a compact "standard setting."

The Industry Literal was developed to achieve that standard setting. The contrast between it and the Industry Standard reveals the more generous -- and hence more readable -- spacing of the warning statement text that the industry has elected to emplcy.

The ultimate question, of course, is whether, confronted with advertisements using these three typesettings, the ordinary reader can perceive any significant difference. Exhibit U permits this comparison readily to be made. It demonstrates that, regardless of which typesetting is employed, the warning statement will be equally noticeable to the reader.

(2) The Staff's Position Cannot Be Sustained By The Language Of The Order

(a) Leading. Section C.2 of the Order governs leading. In pertinent part, it provides:

> "The warning statement shall be set in two horizontal lines . . . separated by leading equivalent to the lower case 'x-height,' excluding the ascending and descending letters of the particular type-size."

"Lower case x-height" is a conventional and precise concept to a typographer: it denotes the height of the lower case letter "x" as it appears in the particular style and size of type employed. The following phrase -- "excluding the ascending and descending letters" -- plainly directs that "ascending and descending letters" be "excluded" in measuring the distance between each line of type where the prescribed leading is to be positioned. Thus, as C.2 must be read, measuring from the base line of the top line of text to the x-height of the lower line (i.e., "excluding the ascending and descending letters"), there must be spacing equal to the "lower case x-height" for the particular type size employed.

The Order's directions for positioning the leading are precisely illustrated by our Literal. It is notable that, for each type size, the Industry Standard employs more generous leading than this formula requires. On the other hand, the Staff "Literal" erroneously changes the word "excluding" in the phrase "excluding the ascending and descending letters" to

the word "including" and thus completely ignores the clear meaning of the requirement.

(b) Spacing to the rule. The spacing between the warning statement text and the ruled rectangle is governed by C.4 which, in pertinent part, provides as follows:

> "The size of the rectangle shall be determined by providing at both ends and at both top and bottom a space between the type block and the enclosing rule not less than the following spaces: where 10-point type is used in the warning statement, the rule shall be 8-points away from the type block; where 12-point type is used in the warning statement, the rule shall be 10-points away from the type block; where 14-point type is used in the warning statement, the rule shall be 12-points away from the type block; and where 16-point type is used in the warning statement, the rule shall be 14-points away from the type block" (emphasis added).

Under C.4, then, it is from the "type block" that the prescribed distances to the rule must be measured. Since "type block" is not a conventional concept within the printing trade, its import must be derived by looking elsewhere within Section C -- specifically to C.2, which addresses the analogous problem of the "leading," or spacing, between the two lines of the warning statement.

C.2 measures leading from the base line of the top line -- i.e., excluding the descending letters -- and from the x-height of the bottom line -- i.e., excluding the ascending letters. Consistency with that language requires that the

"type block" of the warning statement likewise be defined by the x-height of the top line of text and the base line of its bottom line.

Our literal was prepared to embody this definition of type block. In this respect, too, the specifications of the Industry Standard Acetate are more generous than the Order requires; both the lower and upper spacing to the rule in the Standard is larger than the spacing in our Literal.

(3) The Compliance Staff's Position Cannot Be Reconciled With The Negotiations Of The Order

On November 12, 1971, at a critical juncture in the negotiations of the Order, the Staff presented to the full Commission six "mock-up advertisements" on which the warning statement in its rectangle had been superimposed. Those mock-ups are important in discerning the intent of the Order as accepted by the Commission, largely because they demonstrate that an agreement between the Staff and the respondents had been reached. It is therefore significant that, with minuscule variation, the mock-ups illustrating the 10-, 12-, and 14-pt. warning statements vindicate our position on leading and spacing to the rule. To demonstrate this point, we have attached as Exhibit V the mock-up illustrating the 14-pt. warning statement. (We present this exhibit by way of illustration, and

reserve all rights of legal privilege as to co-counsel's files relating to the negotiation of the Order.)

(4) The Typography On Advertisements In The Compliance Reports And National And Local Advertisements In The Past Conforms To The Industry Interpretation

It is worth emphasizing, once again, that the Staff assertions on typography are not only belatedly advanced, and insignificant in terms of the Order, but are also in conflict with what was before the Commission when it advised these respondents and publicly announced that they were in compliance in its Reports to Congress in 1972 and 1973. Those facts must be viewed against the present Staff position that its method of measuring typography is the basis for its insistence that there exists vast civil penalty liability across-the-board on every advertisement. As noted, here again, the Staff has refused to discuss our suggestions for accommodation in future compliance.

E. Shrinkage

There are over a thousand daily newspapers published in the United States. Their printing plants and production techniques vary from almost archaic (hot metal, even flat bed) composition and printing to the most modern methods (photographic plating, offset printing, rotogravure, and other rapidly developing new techniques). The furnishing of advertising

materials (mats, plates, Scotch prints, and Repro Proofs) from which each of these newspapers prepares its press materials is a highly complicated operation. In addition, there are varied forms of preprinted newspaper stock (Spectacolor and Hi-Fi).

From the outset of the negotiations, it was understood that respondents' responsibility for compliance would embrace only the materials which they prepared and against which their compliance could realistically be measured. As the negotiators recognized and as Section C.8 of the Order indicates, they have no control over the production processes in the publication of newspapers or of magazines.

The subject of "shrinkage" in newspaper printing was never mentioned during the negotiations. It was unknown to the negotiators of the Order. Indeed, co-counsel never heard of newspaper shrinkage until the spring of 1974.

Nevertheless, throughout the present investigation, the new Staff theory has been that respondents could control newspaper printing methods and hence the varying shrinkage practices to which large and small newspapers, for economic reasons, have been compelled to resort increasingly during the past two and a half years. It is asserted that the "shrinkage" by newspapers in their printing has resulted in violations by respondents. Of course, neither newspapers nor magazines are respondents under the Order.

The economic pressures upon the newspaper industry that engender this problem are continuing. (See, e.g., Exhibit W.) An understanding of practices in newspaper production as it relates to this Order therefore requires a brief exposition.

In recent years, the major item in a newspaper's budget -- newsprint -- has undergone a series of dramatic and frequent increases in cost.[37/] To avoid burdening their readers and their advertisers with that increase, the newspapers have sought many mechanisms for conserving newsprint. One such mechanism, facilitated by changes in newspaper technology, has been intentional shrinkage -- the photographic compression of the printed newspaper copy by the newspaper's composing staff into a smaller area which will occupy a narrower, and hence cheaper, roll of newsprint.

Because of shrinkage, the warning statement, along with all other newspaper copy, has been slightly reduced in size. This reduction has occurred even though the production materials furnished to the newspapers by the respondents have been prepared in complete conformity to the Order. While the degree of shrinkage has fluctuated and continues to change from day to day and from newspaper to newspaper, on the average it has slightly contracted the width of each newspaper page and

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37/ Between 1972 and 1974, newsprint has increased from $165 to $220 a ton. It is now reported to be over $250 per ton. In 1974, ten and a quarter million tons were used in newspapers.

depending upon the size of the newspaper advertisement has also contracted the warning statement, principally in its width.[38/] Readability of the warning statement has not been impaired.

Not surprisingly, the most severe shrinkage has occurred in the ethnic press. Ethnic newspapers are subject to the most acute economic stresses and therefore are most pressed to compensate for the rising cost of newsprint.

As we understand its position, the Staff asserts that, because of shrinkage, two violations of the Order have occurred in newspaper advertisements. First, the warning statement has not "appeared" in Univers 47 type style, as C.3 requires. And, second, the warning statement has not "appeared" in the requisite type sizes that C.3 specifies for the four basic size categories of advertisements. The Staff would make these minor deviations in newspaper printing chargeable to the respondents even though no act committed by the respondents has caused them.

During the negotiations of the Order, the respondents' negotiators and the Staff never discussed shrinkage nor were those negotiators even aware of its existence. As a result, there is no provision of the Order that speaks directly to the

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38/ Horizontally, the warning statement has on the average been reduced by 0.164 inches for the 10-pt. size, 0.184 inches for the 12-pt. size, 0.213 inches for the 14-pt. size, and 0.225 inches for the 16-pt. size. Vertically, the average reduction has been even smaller -- 0.009 inches for the 10-pt. size, 0.011 inches for the 12-pt. size, 0.013 inches for the 14-pt. size, and 0.014 inches for the 16-pt. size.

subject. Nevertheless, under the general principles which the Order sets forth, the consequences of shrinkage by newspapers cannot be considered the responsibility of the respondents.

(1) Section C Of The Order Governs The Warning Statement As It Is Presented In The Respondents' Production Materials, Not As Newspapers Print It

The language of Section C is consistently phrased to govern the warning statement as it must be typeset and not as it is to appear on the printed page. C.2 prescribes that "the warning statement shall be set in two horizontal lines"; C.3 specifies "the type size to be employed";[39/] C.4 provides that the "warning statement shall be set in a ruled rectangle."[40/] (Emphasis added.)

Looking beyond the language of these provisions to the realities of the newspaper production process, it is imperative that the responsibility of the respondents end when production materials pass out of their hands. It is impossible

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39/ In one respect, type style, Section C.2 is phrased in terms of how the "warning statement . . . shall appear." Yet, in the very next sentence, C.2 reverts to a specification of the "type size to be employed" by respondents. This change in emphasis, in so carefully drafted an order, can hardly be considered inconsequential.

40/ The term "type size" is significant only in the context of the typesetting phase of the reproduction process. It denotes not the height of a character as it appears on the printed page but rather the height of the type slug, the block on which the characters are mounted and which a typographer uses to typeset text.

for the respondents or their advertising agencies to foresee, let alone control, the many modifications in printing which can occur as production materials are transformed into the final printed page. For example, in addition to shrinkage, it is not unknown for a newspaper in its printing to blur the warning statement text or the ruled rectangle surrounding it. No degree of diligence that the respondents might exercise could prevent these irregularities from occurring.

During the negotiations of the Order, both the respondents and the Commission Staff recognized that the respondents lacked the ability to control the production practices of publications and that therefore deviations in the appearance of the warning statement due to those practices should not be chargeable to the respondents. As a result of that recognition, the negotiators drafted Section C.8 of the Order, which provides that:

> "Blurring or illegibility of the warning statement in its rectangle occurring for reasons beyond the control of the respondents shall not be in violation of this Order."

It is clear that other irregularities such as shrinkage are comprehended by the same realistic principle as well.

(2) If Section C Is Construed to Govern The Warning Statement As It Is Printed On The Newspaper Page, Compliance With It Is Impossible

It is clear to us that a respondent will be relieved from obligations under a Commission order that are impossible

to fulfill. We can conceive of no violations of a Commission order more clearly beyond a respondent's power to prevent than those violations that are said to result from shrinkage.

As we have pointed out, the degree of newspaper shrinkage is not a constant. It varies from day to day and from newspaper to newspaper in response to such factors as the supply and price of newsprint, the economic stresses a particular newspaper is experiencing, and the production techniques the newspaper is in a position to employ or to its ability to capitalize new equipment. Moreover, because intentional shrinkage is so recent a practice as well as because it fluctuates so frequently, there is no current and widely available source from which reliable information about it can be derived. (See Exhibit W.)

For these reasons, there is no way that the respondents could prepare production materials that, after shrinkage, would completely guarantee the appearance of the warning statement in the exact type sizes specified by C.3 of the Order.

Moreover, because shrinkage almost uniformly is more acute horizontally than vertically, some slight distortion in the type style in which the warning statement appears is likewise unavoidable. As a result, it is impossible to prepare newspaper production materials which, after shrinkage, would completely guarantee the appearance of the warning statement minutely matching the typographical font characters of the

Univers 47 type style in which production materials are prepared by the respondents in compliance with the Order.

A rigid insistence that all newspaper advertisements appear as printed precisely as prescribed in C.3 could result in the diminution of much of the respondents' newspaper advertising. That prospect was clearly not contemplated by the drafters of the Order, and would, moreover, be certain to inflict substantial economic loss on the newspaper industry. Such loss would be most pronounced for ethnic newspapers. The implications of the Staff position for these newspapers need no elaboration.

(3) Shrinkage Has Not Impaired The Prominence And Legibility Of The Warning Statement

First, the most prevalent, and most acute, form of shrinkage has been horizontal, not vertical.[41/] Hence, shrinkage has had little, if any, effect on the vertical type size in which the warning statement appears.

Second, as we have developed, the respondents' Standard Acetate employs a generous spacing of the words and letters of the warning statement. As a result, horizontal shrinkage of the statement has reduced it in width only to a minuscule degree.

41/ For example, in 60% of the newspaper advertisements we have examined, there was no shrinkage whatever in the depth of the warning statement.

Finally, and most important, shrinkage reduces the entire advertisement to the exact degree that it reduces the size of the warning statement. The relative prominence of the warning statement within the advertisement has remained undiminished.

F. Foreign Language Warning Statement

On August 9, 1973, the Commission published in the Federal Register[42/] an "Enforcement Policy Statement" announcing that, in previously issued Commission orders requiring "'clear and conspicuous disclosure' of certain information, that disclosure must be in the same language as that principally used in the advertisements and sales materials involved." Shortly thereafter, the Staff approached the respondents to request that they prepare a Spanish version of the warning statement for use in Spanish language advertisements. The respondents acceded to that request. By December 10, 1973, the respondents had been recommended a Spanish translation, prepared by a university language expert, and, some time thereafter, that warning statement began appearing in Spanish in Spanish language advertisements.

The respondents' efforts to employ a foreign language warning statement in their foreign language advertising were recognized by the Commission in its 1973 Report to Congress where the Commission said:

42/ 38 Fed. Reg. 21494-95.

> "The Commission has received assurances from the cigarette advertisers that warning statements required by those consent orders will be in the language principally used in each cigarette advertisement" (p. 6).

The Staff now insists that all foreign language advertisements containing an English language warning statement published since the Commission's "Enforcement Policy Statement" are in violation of the Order. It further maintains that all advertisements containing Spanish warning statements constitute violations because their translation of the warning is incorrect as to two words.

We know of no legal principle which permits the Commission, acting unilaterally, to amend the terms of an Order that has resulted from the consent of the respondents and the Commission. Therefore, any requirement that the respondents use a foreign language warning statement can derive only from the provisions of the Order.

Fairly read, the Order contains no such provision. If anything, it compels the respondents to present the warning statement only in the English language. Section C.1 requires that "The language of the warning statement shall be precisely as prescribed by Congress in Section 4 of the Public Health Cigarette Smoking Act of 1969" (emphasis added). Since Section 4 of the Act presents the warning statement in the English language, it is clear that the respondents are directed to do likewise.

Since the Order does not require a foreign language warning statement, a fortiori it cannot require any particular translation when the respondents voluntarily agree to use a foreign language warning statement. There is therefore no basis under the Order for asserting past violation.

Nevertheless, respondents have repeatedly made it clear to the Staff that they are not unwilling, as part of any overall determination for the future, voluntarily to agree that the warning statement in foreign language newspapers will appear in the language principally employed in a reasonable translation determined by independent experts.

IV

Recommendations

First, respondents respectfully submit to the Commission that there is no basis for any broadside charges of noncompliance. The new and strained Staff interpretations of the Order on which it predicates its across-the-board charges of noncompliance, cannot be sustained. They inescapably cast doubt upon the good faith of the Commission in issuing the Consent Orders. They fly in the face of the negotiations for this Consent Order. They conflict with what was presented to the Commission in the Compliance Reports in 1972. They repudiate the public representations of the Commission to Congress both in 1972 and 1973. Up to this point, there has been no indication from the Commission that the now suggested basic

differences in interpretation of the Consent Order existed, or that it has been dissatisfied with respondents' compliance. Even if forthright particularization by the Staff of specific violations is forthcoming, respondents will not initially agree to the payment of generalized massive penalties. Their only recourse is to energetic and extensive defense in the courts.

Second, precise agreement as to what will constitute compliance in the future is paramount and patently fair. The importance of these questions to this entire industry and the magnitude of the advertising concerned needs no further elaboration. The new Staff theories, if followed in full, could diminish much newspaper and virtually all billboard advertising. Both the economic consequences and public implications of these results cannot be countenanced. Nor can these respondents fairly be put at legal risk while the newly developed differences of interpretation of this inescapably complex Consent Order are being litigated.

Respondents insist, and can demonstrate, that there has been substantial compliance. Respondents have suggested that as to the future there can be agreed upon refinements in the presentation of the warning statement under the Order. The Staff interpretation as to billboards virtually forecloses that possibility. Respondents have advanced their suggestions to the Staff. Discussion of them has been foreclosed absent the respondents coming forward with large sums and conceding the existence of extensive and unspecified past violations.

Third, resolution of the questions raised by this prolonged and extensive, as well as costly, investigation requires that the Commission return it to the Staff. Future compliance can then be discussed. If an accord can be reached on future compliance, then an appropriate disposition of any charges of alleged noncompliance can also be discussed.

As the courts have determined in crystal clear fashion, the Federal Trade Commission Act is not a revenue-raising or penal measure. Administrative penalty actions repudiating public agency announcements, upon which respondents have fairly relied, are not judicially accepted (supra, pp. 7-8). Compliance procedures should seek conformance with Commission orders -- particularly a Consent Order of the industrywide scope, media importance, and complexity of this Order.

Respectfully submitted,

Horace R. Kornegay

H. Thomas Austern

Counsel

ATTACHMENT A--EXHIBITS TO STATEMENT ANNEXED TO COUNTER AFFIDAVIT OF H. T. AUSTERN

TABLE OF EXHIBITS

Exhibit No.	Description
A	The Aide Memoire
B	The Order
C	A copy of the letter sent by the Commission to each of the respondents advising them that their compliance reports had been accepted
D	Exhibit attached to the Brown & Williamson compliance report -- illustrating, in the form of a mini proof of an entire billboard, the size of warning statement employed in billboard advertising
E	Excerpt from the text of the Philip Morris compliance report -- indicating that POS items, delivered in final form to the printer before July 14, 1972, were exempt from carrying a warning statement
F	Exhibit from the Liggett & Myers compliance report -- displaying the typesetting of the warning statement embodied in the Standard Acetate
G	Exhibit from the Lorillard compliance report -- a tear sheet of a newspaper advertisement revealing the existence of shrinkage
H	Internal documents from the American Brands, Brown & Williamson, Lorillard, and Liggett & Myers company files, submitted to the Staff during this investigation -- indicating the respondents' efforts to acquaint their employees with the requirements of the Order
I	Internal documents from the Philip Morris, R.J. Reynolds, and Lorillard company files, submitted to the Staff during this investigation -- indicating the respondents' procedures for insuring compliance
J	Internal documents from the American Brands company file, submitted to the Staff during this investigation -- indicating the respondents' efforts to destroy pre-Order advertising materials to avoid their accidental use

Exhibit No.	
K	Internal documents from the American Brands and R.J. Reynolds company files, submitted to the Staff during this investigation -- indicating the respondents' efforts to inform publications of the requirements of the Order
L	Internal documents from the R.J. Reynolds company files, submitted to the Staff during this investigation -- indicating the respondents' efforts to insure that errors by publications would not recur
M	A photographic reproduction of one or more vending machine advertising display panels on the machine front
N	A Salem plastic change mat -- illustrating a nonadvertising, functional POS surface (see enclosed envelop
O	A Camel POS piece -- illustrating a POS piece with noncigarette advertising copy (see enclosed envelope)
P	Industry Standard Acetate
Q	The Staff Literal
R	The Industry Literal
S	Comparison between the leading and the spacing to the rule for the Industry Standard and the Staff Literal
T	Comparison between the total area of the Standard and the two Literals
U	Mock-up advertisements illustrating Industry Literal, Industry Standard, and Staff Literal
V	Mock-up advertisements of a 14-pt. warning statement submitted to the Commission during the negotiation of the Order
W	Advertising Age article, indicating fluctuations in shrinkage

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Attachment A--Exhibits to Statement

EXHIBIT A

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J. RANDOLPH WILSON
ROBERTS B. OWEN
EDGAR F. CZARRA, JR.
WILLIAM H. ALLEN
DAVID G. ISSELL
JOHN R. JONES, JR.
J. EDWARD DUNKELBERGER, JR.
BRICE MEADOR CLAGETT
JOHN S. KOCH
ROBERT C. O'MALLEY
EUGENE I. LAMBERT
JOHN VANDERSTAR
NEWMAN T. HALVORSON, JR.
HARVEY M. APPLEBAUM
MICHAEL S. HORNE
JONATHAN D. BLAKE
CHARLES E. DUFFON
ROBERT N. SAYLER
EDWARD BRUCE
DAVID N. BROWN
PAUL J. TAGLIABUE

JOHN G. LAYLIN
FONTAINE C. HUDDLEY
EDWARD BURLING, JR.
JOEL BARLOW
J. HARRY COVINGTON
W. CROSBY ROPER, JR.
DANIEL M. GRIDDON
HARRY L. SHNIDERMAN
DON V. HARRIS, JR.
WILLIAM STANLEY, JR.
WEAVER W. DUNNAN
EDWIN M. ZIMMERMAN
JEROME ACKERMAN
HENRY P. BAILEY
JOHN H. SCHAFER
ALFRED H. MOSES
JOHN LEMOYNE ELLICOTT
DAVID E. McGIFFERT
PHILIP B. STANSBURY
CHARLES A. MILLER
RICHARD A. BRADY
HERBERT DYM
CYRIL V. SMITH, JR.
MARK A. WEISS
HARRIS WEINSTEIN
JOHN B. DENNINGTON
PETER J. NICKLES
MICHAEL BOUDIN
BINGHAM B. LEVERICH
ALLAN J. TOPOL
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CHARLES LISTER

EDWIN S. COHEN
OF COUNSEL

January 16, 1975

J. Thomas Rosch, Esquire
Director
Bureau of Consumer Protection
Federal Trade Commission
Washington, D.C. 20580

Dear Mr. Rosch:

We have prepared the enclosed Aide Memoire in the hope of saving time at the scheduled discussion on January 20th of possible settlement of the issues raised during the past eight months in the investigation of asserted violations of the Consent Orders in Docket, Nos. C-21[illegible] through C-2185, and facilitating your consideration of the respective positions of the Compliance Staff and the respondents, along with our suggestions for resolution of some of these issues.

This presentation, with the accompanying illustrative Exhibits, may be read in a reasonable time. You may have an opportunity to examine it prior to our meeting.

Almost needless to say, this examination of the advertising and promotional materials of six major cigarette manufacturers, over a period of eighteen months since the various provisions of the Order became operative, involves an inescapably complex situation.

The investigation encompassed some thousands of advertisements and point-of-sale materials. As co-counsel for the six companies, both Mr. Kornegay and I have endeavored to facilitate the investigation and to minimize the time and resources that had to be deployed by both the Commission Staff and the respondents. Nevertheless, the investigation

COVINGTON & BURLING

has involved costs to these six respondents of over some $500,000.

As you may readily discern from our presentation, the respondents must in any overall settlement know where they stand and what will constitute agreed upon compliance in the future. That is the paramount initial area of settlement discussion that must be resolved because hundreds of millions of dollars of future advertising and promotional materials are concerned along with potential civil penalties once the Commission has notified the respondents of its views as to these points at issue.

It must be understood that in presenting this Aide Memoire as background for your consideration of any overall settlement proposals, no statements made in it can be taken as admissions of any violation by any respondent or as admissions as to any specific facts in the event that settlement negotiations do not turn out to be successful and inescapably massive compliance litigation might be instituted. The Aide Memoire has been prepared solely for discussions of settlement. It is not the report we would submit to the Commission to accompany any Staff report in the event that settlement discussions are unsuccessful and any recommendation for civil penalty actions is presented.

On January 15, 1975, Mr. Kornegay and I had a preliminary discussion with Messrs. Meyer, Boyle, and Koman of the Compliance Staff as to the positions taken by each side and the suggestions advanced and sought for the purpose of initially determining what would be acceptable compliance in the future.

We are providing a copy of the Aide Memoire to Mr. Meyer in advance of the meeting.

Very truly yours,

H. T. Austern

encls

AIDE MEMOIRE

Areas To Be Negotiated For Future Compliance And Settlement Of Pending Investigation

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Attachment A--Exhibits to Statement

January 15, 1975

AIDE MEMOIRE

Areas To Be Negotiated For Future Compliance
And Settlement Of Pending Investigation

It is the purpose of this Aide Memoire to provide essential data on the six basic areas of purported violation of the Consent Order.

Resolution and settlement of these areas for the future is essential. No possible settlement of differences as to what the Order means--or what constituted compliance with it in the past--will serve any useful purpose for the Commission or the respondents unless what is to be required in the future is precisely determined.

Hundreds of millions of dollars of advertising and promotional materials, both past and future, are involved. Twenty-two tobacco growing states and 700,000 individuals employed in growing, and in manufacturing cigarettes, apart from those in distribution, are concerned.

The Compliance Staff asserts six basic interpretations of the Consent Order which, in their view, yield past violations and control future compliance on all advertising of cigarettes.

The respondents insist that these interpretations are unwarranted, conflict with the explicit language of the Order,

distort what was agreed upon in its negotiations with the Commission, contradict the public statements of the Commission to Congress about compliance, and were and are impossible of realistic application.

Any feasible settlement necessitates that these issues be understood and that there be complete and precise agreement as to what will be future compliance.

Settlement can, on some points, offer possibilities of accommodation for the future. But any realistic approach necessitates that on these basic issues of interpretation there be initial agreement.

In this Aide Memoire there is presented a brief summary of the negotiations for the Order and a presentation of the Staff position on these six basic and controlling questions with the respondents' opposing positions. There is also indicated some possible accommodations and changes for the future which co-counsel, representing the six respondents, are prepared to recommend with confidence of their being accepted.

We do not in this memorandum elaborate legal principles or decisions. It is assumed that these are equally available to the Commission Staff as well as to respondents. The effort is to penetrate the underlying interpretations and to present objectively what the respondents insist, and are prepared to

establish, are the facts. Inescapably, those facts are technically detailed, and the novel interpretations, first advanced by the Staff two years after the Order, are complicated.

The Consent Order And The Compliance Investigation

The Commission's Consent Agreement and Orders in Docket Nos. C-2180 through C-2185 were issued on March 30, 1972, after five months of intense negotiations between present co-counsel, representing the six proposed respondents, and Messrs. Pitofsky, Thain, Brauninger, and Powers of the Commission Staff. As negotiations progressed, they were closely monitored by the five Commissioners, who, on a number of occasions, reviewed "mock-up" advertisements illustrating alternative presentations of the warning statement, and approved or rejected the tentative approaches which the Staff and the industry had developed.

Between March of 1972 and April of 1974, when the present investigation commenced, the respondents never received the slightest indication that the Commission was dissatisfied with their performance under the Order.

Indeed, the official statements of the Commission indicated the contrary. In December 1972, after reviewing the compliance reports which the six respondents had submitted

earlier that year, the Commission advised each of the respondents that "on the assumption that the information submitted is accurate and complete, ... no compliance action by the Commission is indicated at this time."

Equally significant, in its December 31, 1972, report to Congress required under the Public Health Cigarette Smoking Act of 1969, the Commission stated that "Advertisements containing the disclosure statement in the format required by these Orders began to appear in May of 1972 and, by the end of October, all cigarette advertisements observed by the Commission Staff were being published in accordance with the terms of these Orders."

Whatever may have been the scope of the indicated observation of cigarette advertising by the Commission Staff between May to October, 1972, it certainly must have included weekly national magazines such as Time, Newsweek, and Life. Extensive newspaper advertising of cigarettes also appeared in The Washington Post and Washington Star in that period. Those advertisements in format reflected the interpretations of the Order which the respondents now assert.

The massive record cooperatively developed by the present compliance investigation underscores the time, money, and diligence that the respondents have devoted to ensuring that each of their advertisements contains the warning statement and that each warning statement conforms to the requirements of the Order.

We have seen no evidence which detracts from that record of diligence. The legal interpretations of the Order that, at various times since 1972, the respondents have adopted reflect not "collusion" to evade the Order but a forthright effort to pool their knowledge and formulate a common policy on issues of compliance that each respondent had found complex and difficult. It was exactly such a uniform reading of the Order that Mr. Pitofsky--recognizing the intricacy of the Order and the many interpretative problems it posed--had urged adopting during its negotiation.

In the course of its present investigation, the Staff has suggested that a number of the overall practices of all six respondents constitute violations of the Order. In the following discussion, we will endeavor to summarize the Staff's theories and to outline our responses to them.

On each point, we believe that the respondents have conformed both to the letter of the Order and to its intent, as manifested by the consensus that evolved between the Staff and the respondents during negotiations. More important, however, even assuming arguendo that the respondents have erred in their reading of the Order, we submit that their purported violations have not detracted from the realization of the Order's overriding goal--the presentation of a clear and conspicuous health warning statement to the public.

To underscore that all-important point--and to set the respondents' alleged violations in proper perspective--we emphasize the thousands of magazine and newspaper advertisements, point-of-sale pieces, billboards, and transit cards produced by the respondents since 1972 that have, without possible challenge, contained a health warning statement substantially in accordance with the Order's requirements.

I. Typography

For each of the four basic categories of advertisements, Section C of the Order spells out the requisite dimensions of the health warning statement--the style and size of the type, the spacing or "leading" between the two lines of text, and the positioning of the ruled rectangle surrounding the text. A copy of the Order is submitted as Exhibit A. Since June of 1972, the respondents have employed a "Standard Acetate" or transparent overlay to govern their compliance with Section C. */

As we understand its position, the Staff asserts that this Standard Acetate departs from Section C in two respects: First, the "leading" between its two lines is said to be smaller than C.2 requires. This is so, contends the Staff, because the prescribed distance between the two lines--

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*/ The Standard Acetate is submitted as Exhibit B.

the "x-height" of the particular type size employed--has not been measured from the "shoulders" of each line of type. And, second, the vertical "spacing" between the "type block" and the ruled rectangle is said to be smaller than C.4 requires. The reason for this, says the Staff, is that the prescribed spacing--the particular type size employed less two points--likewise has not been measured from the "shoulders" of each line of type.

To illustrate its contentions, the Staff has prepared what it terms its "Literal"--a typesetting of the warning statement that embodies its conception of the requirements of of Section C.*/ The respondents, in turn, have developed their "Literal," which not only embodies their interpretation of Section C but, in addition, illustrates that the industry "Standard Acetate" is a substantially more generous rendition of the warning statement than Section C requires.**/

A. The Staff's Literal Is Not A More Noticeable Rendition Of The Warning Statement Than The Industry Standard

Before indicating why we believe our interpretation of C.2 and C.4 must prevail, we think it instructive to compare these three typesettings--the "Industry Standard" and

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*/ The Staff's Literal is submitted as Exhibit C.

**/ The Industry Literal is submitted as Exhibit D.

the two Literals--in order to show how inconsequential their differences in fact are.

First, the leading in the Staff Literal exceeds the leading in the Industry Standard by only four points for the 10-pt. warning statement, 6 1/2 points for the 12-pt. warning statement, and seven points for the 14-pt. statement. A point is equivalent to 1/72 of an inch. Translated into inches, these disparities are only 4/72", 13/144", and 7/72", respectively.

Second, the differences in the vertical spacing in the Staff Literal and the vertical spacing in the Industry Standard acetate are minuscule. In the 10-pt. warning statement, the combined length of the ascenders and descenders is four points. In the 12-pt. type, it is five points. In the 14-pt., it is six points. Thus the differences in the method of typographical measurement for determining the distance from the type to the rules amount to 4/72", 5/72", and 7/72", respectively. As will be demonstrated, these differences are hardly visible to any normal person viewing the advertisement.

Third, it is important to remember that leading and vertical spacing to the rule only affect the depth of the warning rectangle. The Staff does not challenge the Industry

Standard's measurement of the warning rectangle's width. Indeed, in the 10- and 12-pt. sizes, the Industry Standard is wider than the Staff Literal by 9 and 3 points respectively.*/ Moreover, looking beyond the width and depth of the warning rectangle to its overall area--surely a more significant test of its prominence within the ad--one is struck again by the minute differences between the Industry Standard and the Staff Literal--even assuming the latter's accuracy. Exhibit E demonstrates that, to the observer, the two rectangles are virtually indistinguishable in area. Arithmetic computation confirms this conclusion: for the 10-, 12-, and 14-pt. sizes, the Staff Literal exceeds the Industry Standard acetate in area by only 0.174, 0.248, and 0.596 square inches, respectively.

Fourth, it is doubtful whether the dimensions of the ruled rectangle are as important in arresting the reader's attention as the way in which the actual text within the rectangle is set. The text, after all, contains the message that the Order seeks to convey to the reader. It is a basic axiom of typography that readability is enhanced or reduced by widening or narrowing the spacing which separates individual letters and words from each other. Section C is silent on

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*/ In the 14-pt. size, the standard is only 5 points, or 5/72", smaller.

this critical subject, thus permitting the respondents, if they had desired to do so, to compress the words and letters of the warning statement to what is known to typographers as a standard setting.

Had the respondents desired to use the tightest horizontal setting permitted by the Order, the warning statement would have matched the Industry Literal, which was set to achieve the standard setting of letters and words. The contrast between the Industry Literal and the Industry Standard reveals the more generous--and hence more readable--spacing of the warning statement text that the industry has elected to employ.

Finally, the ultimate question is whether the ordinary reader, confronted with the Industry Standard and the two Literals, can perceive any significant difference between them. In Exhibit F, we have presented a series of advertisements with the three renditions of the warning statement superimposed upon them. Comparison between these advertisements, we believe, makes it unequivocally clear that, regardless of which typesetting is employed, the warning statement will be equally noticeable to the reader.

B. The Staff's Position Cannot Be Sustained By The Language Of The Order

(1) Leading. Section C.2 of the Order governs leading. In pertinent part, it provides:

> "The warning statement shall be set in two horizontal lines . . . separated by leading equivalent to the lower case 'x-height,' excluding the ascending and descending letters of the particular type-size."

"Lower case x-height" is a familiar and precise concept to a typographer: it denotes the height of the lower case letter "x" as it appears in the particular style and size of type employed. The phrase following "lower case x-height"--"excluding the ascending and descending letters"--is hence unnecessary to illuminate its meaning. If that phrase is not mere surplusage, it must have some purpose of its own. Its plain purpose was to direct that "ascending and descending letters" be "excluded" in selecting the points on each line of type for the prescribed leading to be positioned between. Thus, as C.2 must be read, measuring from the base line of the top line of text to the x-height of the lower line (i.e., "excluding the ascending and descending letters"), there must be spacing equal to the "lower case x-height" for the particular type size employed.

By positioning the leading between the shoulders of each line of type, the Staff's reading of C.2 not only

disregards the phrase "excluding the ascending and descending letters," but in effect converts it from "excluding the ascending and descending letters" into "including the ascending and descending letters."

The Order directions for positioning the leading are illustrated by our Literal. It is notable that, for each type size, the Industry Standard employs more generous leading than this formula requires. */

(2) Spacing to the rule. The spacing between the warning statement text and the ruled rectangle is governed by C.4 which, in pertinent part, provides as follows:

> "The size of the rectangle shall be determined by providing at both ends and at both top and bottom a space between the type block and the enclosing rule not less than the following spaces: where 10-point type is used in the warning statement, the rule shall be 8-points away from the type block; where 12-point type is used in the warning statement, the rule shall be 10-points away from the type block; where 14-point type is used in the warning statement, the rule shall be 12-points away from the type block; and where 16-point type is used in the warning statement, the rule shall be 14-points away from the type block." (Emphasis added.)

The critical term in this formulation is "type block." It is from the type block that the prescribed distances to the rule must be measured. "Type block" is not a conventional

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*/ For the 10- and 12-pt. warning statement, the leading in the Standard is one point larger than the leading in our Literal. For the 14- and 16-pt. statement, the leading in the Standard is one-half point larger.

concept within the printing trade, as was discovered when none of the many typographers we questioned were able to elucidate its meaning. Since the concept is ambiguous, it becomes necessary to derive its import by looking elsewhere within Section C--specifically to C.2, which addresses the analogous problem of the "leading," or spacing, between the two lines of the warning statement.

C.2 measures leading from the base line of the top line--i.e., excluding the descending letters--and from the x-height of the bottom line--i.e., excluding the ascending letters. Consistency with that language requires that the base line and the x-height be likewise employed for measuring outward from the warning statement text to the ruled rectangle. Accordingly, the "type block" of the warning statement should be defined by the x-height of the top line of text and the base line of its bottom line.

Our Literal was prepared to embody this definition of type block. In this respect, too, the specifications of the Industry Standard acetate are more generous than the Order requires; both the lower and upper spacing to the rule in the Standard is larger than the spacing in our Literal. */

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*/ For the 10-pt., upper and lower spacing is 1 1/2 points larger; for the 12-pt., one point larger; for the 14-pt., one and two points larger; and for the 16-pt., one point larger.

C. The Compliance Staff's Position Cannot Be Reconciled With The Negotiations Of The Order

On November 12, 1971, at a critical juncture in the negotiations of the Order, the Staff presented to the full Commission six "mock-up advertisements" on which the warning statement in its rectangle had been superimposed. These mock-ups are important in discerning the intent of the Order's drafters, for it was largely on their basis that a consensus between the Staff and the respondents was reached. It is therefore significant that, with slight variation, the mock-ups illustrating the 10-, 12-, and 14-pt. warning statements vindicate our position on leading and spacing to the rule.*/ To demonstrate this point, we have attached as Exhibit G the mock-up illustrating the 14-pt. warning statement. (We present this Exhibit by way of illustration, and reserve all rights of legal privilege as to co-counsel's files relating to the negotiation of the Order.)

D. Recommendations For Settlement And Future Compliance As To Typography

For the future, we are prepared to recommend some accommodation on typography.

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*/ In the two mock-ups illustrating the 10-pt. warning statement, the leading is one point smaller than the leading in the standard while the spacing to the rule is slightly, e.g., 2 1/2 points, larger. In the two mock-ups illustrating the 12-pt. warning statement, the leading is again smaller than in the Standard, and the spacing to the rule is again slightly, e.g., 2 points, or 2/72 of an inch larger.

In doing so, there must be a background understanding on three cardinal points.

The first is that these respondents will not be held in violation of the Order so long as the production materials which they or their agencies prepare and distribute to any media are in compliance. This principle was clearly understood throughout the negotiations of the Consent Order. There is simply no other way to operate. As we have repeatedly pointed out in the course of the investigation, neither magazines nor newspapers were named as respondents under the Order.

As we will more fully demonstrate in our discussion of newspaper shrinkage, the type of rigid control over media embodied in some of the positions advanced by the Staff would have required the diminution or cessation of newspaper advertising. That was clearly not contemplated by the Order and for the future may inflict substantial economic loss on the newspaper industry.

Second, the experience of these respondents to date in this investigation makes it imperative that for the future there be agreement with the Commission upon a series of standard acetates or overlays which are to be used to govern compliance. (It may be that a settlement will develop separate agreed-upon acetates for magazines, for ROP newspaper

usage, and for POS usage.) Neither the Commission nor these respondents can effectively operate if arguments are to be generated in the future as to minute typographical variations appearing in particular media.

Third, as to any agreed changes, there must be continued recognition of the need for realistic lead times as understood from the very outset and reflected in Paragraph G of the Order.

Nevertheless, in order to settle the present controversial questions without generating further demands upon the resources of the Commission or the respondents, we are prepared to discuss, and to recommend to the respondents with some confidence in their acceptance, a series of agreements for the future.

As to typography, we are still clear beyond peradventure that the language of Paragraph C.2 specifies leading equivalent to the "x-height" of each type size, measured from the bottom of the lower case characters in the first line to the top of the lower case letters in the second line.

We are, however, prepared to discuss some reasonable method for measuring the space between the first line and the top rule and the second line and the bottom rule more generous than what the Order literally requires.

We do not believe it serves the purpose of the Order to reduce the width of the resulting rectangle. We have demonstrated that the Literal exhibited to us by the Staff results in narrower rectangles than the Standard Acetate now employed by the respondents.

In this area, we are hopeful that it will be understood that these differences of a few type points will hardly commend themselves to either the Commission or to any court as the basis for the proposition that every advertisement prepared since the controlling dates in the Order was in violation. In view of the insignificance of these typographical issues in achieving the objectives of the Order, we are prepared, however, to come to a reasonable accommodation for the future.

II. Shrinkage

In recent years, the major item in a newspaper's budget--newsprint--has undergone a series of dramatic and frequent increases in cost.*/ Understandably reluctant to burden their readers and their advertisers with that increase, the newspapers have sought many mechanisms for conserving newsprint. One such mechanism, facilitated by changes in newspaper technology, has been shrinkage--the photographic compression of

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*/ Between 1972 and the present time, newsprint has increased from $165 to $220 a ton. Some ten and a quarter million tons are used in newspapers.

the newspaper copy prepared either by the advertiser or the newspaper's composing staff into a smaller area which will occupy a narrower, and hence cheaper, roll of newsprint.

Because of shrinkage, the warning statement, along with all other newspaper copy, has been reduced in size. This reduction has occurred even though the production materials furnished to the newspapers by the respondents have been prepared in complete conformity to the Order. While the degree of shrinkage has fluctuated from day to day and from newspaper to newspaper, on the average it has contracted the width of the warning statement by 6.6% and its depth by 2.2%.

As we understand its position, the Staff asserts that, because of shrinkage, two violations of the Order have occurred in newspaper advertisements. First, the warning statement has not "appeared" in Univers 47 type style, as C.3 requires. And, second, the warning statement has not "appeared" in the requisite type sizes that C.3 specifies for the four basic size categories of advertisements. The Staff would make these deviations from the Order chargeable to the respondents even though no act committed by the respondents has caused them.

The discovery of shrinkage in the course of this investigation has come as a considerable surprise to the respondents. During the negotiations of the Order, the respondents and the Staff never discussed shrinkage nor were they

even aware of its existence. As a result, there is no provision of the Order that speaks directly to the subject. Nevertheless, we are confident that, under the general principles which the Order sets forth, the consequences of shrinkage by newspapers cannot be considered the responsibility of the respondents.

A. Section C Of The Order Governs The Warning Statement As It Is Presented In The Respondents' Production Materials, Not As Newspapers Print It

The language of Section C is consistently phrased to govern the warning statement as it must be typeset and not as it is to appear on the printed page. C.2 prescribes that "the warning statement shall be set in two horizontal lines"; C.3 specifies "the type size to be employed";*/ C.4 provides that the "warning statement shall be set in a ruled rectangle."**/ (Emphasis added.)

Looking beyond the language of these provisions to the realities of the newspaper production process, it is imperative that the responsibility of the respondents end when production

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*/ In one respect, type style, Section C.2 is phrased in terms of how the "warning statement . . . shall appear." Yet, in the very next sentence, C.2 reverts to a specification of the "type size to be employed." This change in emphasis, in so carefully drafted an order, can hardly be considered inconsequential.

**/ The term "type size" is significant only in the context of the typesetting phase of the reproduction process. It denotes not the height of a character as it appears on the printed page but rather the height of the type slug, the block on which the characters are mounted and which a typographer uses to typeset text.

materials pass out of their hands. It is impossible for the respondents or their advertising agencies to foresee, let alone control, the many modifications in copy which can occur as production materials are transformed into the final printed page. For example, in addition to shrinkage, it is not unknown for a newspaper in its printing to blur the warning statement text or the ruled rectangle surrounding it. No degree of diligence that the respondents might exercise could prevent these irregularities from occurring.

Section C.8 of the Order expressly recognizes that the respondents cannot control the production practices of newspapers and periodicals. It provides that:

> "Blurring or illegibility of the warning statement in its rectangle occurring for reasons beyond the control of the respondents shall not be in violation of this Order."

While only "blurring" or "illegibility" are cited as production irregularities outside the respondents' responsibility, it is clear that other irregularities such as shrinkage--had they been known to the Order's drafters--would have been covered by the same realistic principle as well.

B. If Section C Is Construed To Govern the Warning Statement As It Appears On The Newspaper Page, Compliance With It Is Impossible

It is clear to us that a respondent will be relieved from obligations under a Commission order that are <u>impossible</u>

to fulfill. We can conceive of no violations of a Commission order more clearly beyond a respondent's power to prevent than those violations that are said to result from shrinkage.

As we have pointed out, the degree of shrinkage is not a constant. It varies from day to day and from newspaper to newspaper in response to such factors as the supply and price of newsprint, the economic stresses a particular newspaper is experiencing, and the production techniques the newspaper is in a position to employ. Moreover, because shrinkage is so recent a phenomenon as well as because it fluctuates so frequently, there is no current and widely available source from which reliable information about it can be derived.

For these reasons, there is no way that the respondents--even assuming it was their responsibility--could prepare production materials that, after shrinkage, would guarantee the appearance of the warning statement in the exact type sizes specified by C.3 of the Order.

Moreover, because shrinkage almost uniformly is more acute horizontally than vertically, some slight distortion in the type style in which the warning statement appears is likewise unavoidable. As a result, it is impossible to prepare production materials which, after shrinkage, would guarantee the appearance of the warning statement precisely matching the typographical font characters of the Univers 47 type style.

A rigid insistence that all newspaper advertisements appear exactly as prescribed in C.3 could result in the cessation of much of the respondents' newspaper advertising. This prospect was clearly not contemplated by the drafters of the Order and would, moreover, be certain to inflict substantial economic loss on the newspaper industry.

C. Shrinkage Has Not Impaired The Prominence And Legibility Of The Warning Statement

First, the most prevalent, and most acute, form of shrinkage has been horizontal, not vertical.*/ Hence, shrinkage has had little, if any, effect on the vertical type size in which the warning statement appears.

Second, as we have developed, the respondents' Standard Acetate employs a generous spacing of the words and letters of the warning statement. As a result, horizontal shrinkage of the statement has reduced it in width only to a minuscule degree below the Order's requirements.

Finally, and most important, shrinkage reduces the entire advertisement to the exact degree that it reduces the size of the warning statement. Hence, the relative prominence of the warning statement within the advertisement has remained undiminished.

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*/ For example, in 60% of the newspaper advertisements we examined, there was no shrinkage whatever in the depth of the warning statement.

D. Recommendations For Settlement And Future Compliance As To Newspaper Shrinkage

This investigation has generated unending exploration and discussion of shrinkage. Shrinkage is certain to persist in the future since it is clear that the respondents cannot control the economics of newspaper printing and that those problems will remain acute as the cost of newsprint continues to increase.

Nevertheless, the Staff has indicated that virtually all of the problems shrinkage has caused under the Order can at the present time be dissipated if the respondents will use the next largest category of warning statement prescribed by Section C for the preparation of production materials for newspapers. We are prepared to discuss that change as part of a settlement. In doing so, the need for a separate agreed-upon ROP newspaper acetate becomes obvious, and if that acetate is employed in the production materials sent to newspapers, there must be no further argument about shrinkage.

III. Vending Machines

For several years, respondents have contracted individually with an organization known as POP Associates for packs of their various brands to be depicted on the front panels of cigarette vending machines. POP is the agent for

the several vending machine manufacturers, and arranges with those manufacturers for package depictions to be prepared and mounted on vending machine panels during their production.

Typically, the final display panel has contained four package depictions, illustrating the brands of either three or four different respondents. Virtually all of the individual package depictions delivered in final form to the printer since July 1972 have been smaller than 36 square inches. In addition, each individual depiction uniformly has been "framed"--i.e., visually segregated from the others so that it would appear to the cigarette purchaser as a distinct display unit.

No provision of the Order speaks expressly to the appropriate treatment of advertising appearing on cigarette vending machines. Nor was the subject of advertising on vending machines ever discussed during the negotiation of the Order. Nevertheless, vending machine advertising may fit within the category of "point-of-sale (POS) promotional materials exhibited to cigarette purchasers" and, if so, would be governed by Section E of the Order. Under Section E, a POS piece must display a warning statement only if it has a "surface containing an advertising display area of more than 36 square inches."

It is our understanding that the Staff contends that, under Section E, a warning statement must appear on all vending machine advertising panels that contain package depictions. The Staff's theory evidently is that, even though each package depiction is smaller than 36 square inches, the panel as a whole constitutes a single advertisement for cigarettes, and therefore the display area of each separate package depiction must be aggregated in order to determine whether a warning statement is necessary.

The Staff advances an additional theory with respect to the package depictions on vending machine panels. It contends that on all such panels whose package depiction went to the printer at any time before July 1972--including those that were installed on vending machines years before the Order took effect--a warning statement is required if one of two conditions is met: (1) the respondent derives some "benefit" from the depiction of his brands on the machine panel; or (2) the respondent maintains "control" over the machine. Such "control" exists, suggests the Staff, whenever the respondent makes any payment to the operator of the machine for stocking the respondent's brands in the machine's columns.*/ When the

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*/ Machine manufacturers typically sell their machines to vending distributors who in turn sell those machines to vending "operators" or "vendors." Most vendors are large regional or national organizations that own many thousands of vending machines. The vendor's employees regularly service the machines (cont'd)

respondents make these column stocking payments, it is argued, they possess sufficient leverage over the operator to require him to place the warning statement on the machine panel.

We submit that neither of the Staff's theories can be sustained.

A. Each Vending Machine Panel Contains Four Separate Advertisements, Each Of Which Is Entitled To Section E's Exemption For POS Pieces Smaller Than 36 Square Inches In Advertising

The format of the machine panel is designed to separate the four package depictions from each other, not to integrate them into a common aesthetic presentation.

The independence of each package depiction is further underscored both by the method by which the particular respondent pays for that depiction and by the manner in which it is prepared. Each respondent agrees to pay POP only for making available the space in which that respondent's brand will be depicted. The respondent does not pay for the common background area on the panel nor for the space to be occupied

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(cont'd) by stocking them with merchandise and by removing cash from the coin-box. Vendors do not always purchase cigarettes from the respondents but instead from cigarette wholesalers. Nevertheless, to insure effective distribution of their brands, each of the respondents contracts with vendors for the payment of nominal sums per machine in return for the vendor's efforts to stock some of their brands in the columns of that machine.

by the other respondents' brands. POP, which accepts payment from the individual respondent in exchange for its commitment to arrange advertising space, does not serve as the agent for all the respondents, acting collectively.

Instead, as its contracts with each of the respondents state, it is the agent for the different machine manufacturers that prepare and install the package depictions. */ Moreover, the individual respondents have no control over the depiction of other respondents' brands or the common background for the entire panel. Each respondent checks its own depiction in advance of final printing, not those of other respondents or the entire panel proof.

These considerations aside, the basic flaw in the Staff's theory is that it presupposes that the respondents have some interest in advertising their competitors' brands. The respondents do not purchase advertising space on machine panels to promote cigarettes generally. They do so to advertise their specific brands, and they have no incentive for, and an obvious incentive against, any joint venture in which their own efforts induced the consumer to patronize another respondent's product.

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*/ POP's President and Chairman of the Board are former employees of a leading machine manufacturer. Before POP's formation, in 1968, each respondent, on an individual basis, negotiated for advertising space directly with the individual machine manufacturer.

B. The Staff's Theory Of Control Disregards Section G Of The Order, Which Exempts From The Requirement Of A Warning Statement POS Pieces That Went To The Printer In Final Form Before July 14, 1972

Section G was included in the Order to achieve two objectives: First, to assure the respondents of adequate lead-time to conform their advertising to the Order's requirements; and second, to provide for most media and POS materials that the Order would operate prospectively--i.e., that the respondents would not be required to search out POS items long since placed in retail establishments and other points of purchase and to display a warning statement on it. These objectives were clearly understood in the negotiations.

Section G begins by stating the general principle that the Order "shall become effective sixty (60) days after it is finally issued" (i.e., May 30, 1972). It then provides a specific timetable for the Order's application to each of the different advertising media which the Order covers. Subsection (d) sets forth that timetable for POS items as follows:

> "The requirements of [the Order] shall not be applicable to . . . point-of-sale promotional materials . . . delivered in final form to the printer less than forty-five (45) days from the date this Order shall become effective" (e.g., July 14, 1972).

What this language provides is plain and what it does not provide is equally plain. It does not provide, first of

all, that POS pieces delivered to the printer in final form before July 14, 1972 need not contain a warning statement before that date but must contain one thereafter.

Nor does it provide that only POS pieces delivered to the printer in final form between May 30 and July 14, 1972, but not those delivered before that period, are alone exempt from the coverage of the Order. The phrase "delivered to the printer . . . less than forty-five days" from the Order's effective date is as descriptive of pieces printed before that date as those printed after it. Surely, it would be illogical to require a warning statement to appear immediately on POS pieces already printed and installed in retail locations but not on POS pieces still in the production process. If anything, displaying a warning statement on the former category of pieces would seem far more onerous than displaying one on the latter.

What subsection (d) does provide, unambiguously, is that for POS items, the requirement of a warning will apply prospectively, with July 14, 1972 as the date on which that requirement will first arise.

It is significant that when the drafters of Section G desired the inclusion of a warning statement in advertising material in place before the Order, they manifested that desire in explicit language. Thus, subsection (b) provides a

180-day grace period for billboards put into production before July 14, 1972, but as to all billboards, requires the warning statement after that grace period has expired. Subsection (c) provides a similar grace period (140 days) for paperback book inserts and other non-POS items but again, requires a warning statement on all such items once the grace period is over. The absence of a comparable requirement for POS items can only be taken to indicate that those items in place before the Order are exempt from containing a warning statement.

C. The Respondents Do Not Exercise Control Over The Vending Operators

The column stocking payments that the respondents make to machine operators are strictly consideration for merchandise distribution. In no way are they payments for machine panel advertising. Underscoring the absence of any relationship between stocking payments and panel advertisements is the fact that some machines will depict on the panel, but not stock, a given brand, while other machines will stock, but not display, the same brand.

Furthermore, the respondents have no power over the body of the vending machine or the merchandise stocked within it. They cannot, for example, inspect the contents of the machine without the consent of the operator.

. The respondents have no "legal" control and certainly no informal "leverage" over the operator by virtue of any column stocking contract they may have with him. No clause in any column stocking contract confides in the respondent control over the body of the vending machine. Moreover, the revenues derived from the stocking contracts are hardly so substantial as to make the operator beholden to any respondent. In fact, competition among the respondents to induce operator participation in each respondent's stocking program is extremely acute since the number of different brands available for stocking greatly exceeds the number of columns contained in most vending machines. For this reason, it is groundless to assert than an operator is at a disadvantage when he negotiates a stocking contract with a respondent and must therefore acquiesce in the terms that the respondent proposes. If anything, it is the respondent that stands in an inferior position when it deals with the operator.

There is no <u>legal</u> or <u>informal</u> sanction which, realistically, the company can impose on the operator if he refuses to display a warning statement on the machine panel. It should be the availability of such sanctions which determines the existence of control. Otherwise, it could be argued that the cigarette companies <u>control</u> every medium in which they advertise--a position clearly not entertained by the drafters of the Order.

D. Settlement Of Issues As To Vending Machines

For the future, respondents cannot undertake to deal with the thousands of vending machines in place prior to the Order. Nor can they acknowledge in any fashion that they exercise control over vending machine operators under the Order or otherwise.

There may be some mechanism by which the Commission, other than under this Order, or the respondents voluntarily, could arrange that in the future on newly-manufactured machines there be, appropriately placed, a comparable warning statement. But this mechanism would have to be recognized as wholly apart from any concession that the respondents, on and after July 14, 1972, were obligated in any way to deal with vending machine advertising display panels except under Section E of the Order. In this area of vending machines, we would appreciate any specific suggestions which the Staff can develop.

IV. POS

For more conventional POS items, the Staff apparently advances the same theory which it has urged with regard to vending machine panel advertising: that POS items already in place in retail locations before the Order's effective date and still in place must display the warning statement if the respondent derives any "benefit" from their continued

use or if it makes any payments to the retailer. The Staff's theory rests, once again, on a flawed reading of Section G of the Order which, properly construed, provides that, for POS pieces, the Order will operate prospectively. Our arguments to that effect need not be recapitulated here.

The Staff also seems to assert that many of the respondents' POS pieces contain a smaller warning statement than the Order requires. This is an issue of fact as to several items and will be controlled by what is determined for future compliance.

As the Staff evidently recognizes, Section E of the Order requires that the size of the warning statement on a POS piece must be determined by "proportionalizing" the "advertising display area" of that piece to the basic advertisement sizes prescribed by Section C. For example, a POS piece whose "advertising display area" was 50 square inches would, under Section C, require a 10-point warning statement. The Staff's quarrel with the respondents seems to center on the respondents' methods of measuring the "advertising display area."

First, the Staff suggests, on racks for the counter or floor display of merchandise, the respondents have excluded from the "advertising display area" the area occupied by

stacked up cigarette packs and cartons. And second, the Staff suggests, the respondents also have excluded from the "advertising display area" all space which is not used expressly for cigarette advertising. Such space would include a non-advertising functional surface used, for example, as a change mat by the cigarette purchaser or retailer, and surfaces containing non-cigarette related copy--for example, the message "Come-Again" or "Thank-You."

In answering the Staff's contentions, we reiterate that the Order's drafters did not select the overall surface area of the POS piece as the test for determining the appropriate size warning statement. Instead, they selected as their test the "advertising display area." Conceivably, large POS pieces are more successful in attracting the purchaser's attention than small POS pieces. Nevertheless the consideration that is paramount under Section E is the area occupied by cigarette advertising. That area surely cannot comprehend space employed for non-advertising purposes--whether those purposes are to stack merchandise, to provide a convenient surface to assist the retailer in conducting his transactions, or to convey, on the retailer's behalf, a message of thanks to the purchaser for patronizing his establishment.

A. Recommendations For Future Compliance And Settlement As To Point-Of-Sale Materials

For future specific compliance procedures, whatever determinations are made on typography the respondents will agree to carry over to the preparation of all future point-of-sale materials. It is essential, however, that a set of specifics be developed to avoid future misunderstandings. To that end, we are prepared to recommend the following:

First, that a separate agreed-upon acetate be prepared for common use on point-of-sale materials.

Second, that a simplified technique for measuring the advertising display area on each point-of-sale item be agreed upon. The problem of measurement of the advertising display area is a relatively minor one and a simplified formula whereby the area be determined by the maximum vertical height and the maximum width of any item having cutouts or protuberances can readily be agreed upon.

In determining what is the "advertising display area," the respondents are not prepared to include the cigarette packs or cartons which may be placed in counter racks. These arrays of merchandise are not advertising, or in any sense an advertising display area, and the volume of cigarettes which may be in the rack at any given time varies. Nor are the respondents willing to consider the inclusion in the measurement of the advertising display area of the portions of

non-advertising functional statements, such as "Welcome," "Thank You," or Astro Turf or other change mat areas.

If these changes are included in any overall settlement, adequate lead time to effectuate them must be provided. Respondents cannot be obligated to go to thousands of retail outlets and replace materials already distributed. But this is not an important problem because, by and large, point-of-sale materials relate to periodic programs lasting for four weeks or six weeks; new inserts are then distributed and either the salesman or the retailer destroys the old ones.

V. Billboards

Section D of the Order specifically prescribes the size of the warning statement to be employed on billboards. For each of the standard sheet sizes for billboards, the Section provides that the size of the warning statement shall be "not less than" a specified height and that the remaining dimensions of the warning statement shall be proportionalized to those prescribed by Section C.

Seizing upon the phrase "not less than," the Staff suggests that the sizes for billboard warning statements contained in Section D do not control whether a billboard warning statement is "clear and conspicuous."*/ Even though

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*/ There is some uncertainty whether the Staff is presently resolved to recommend this theory as the basis for a civil

(footnote continued)

the prescribed sizes have been employed, the Staff argues that the warning statement must still be tested against some undefined and unspecified independent clear and conspicuous standard. Measured against that notion, the Staff concludes, the vast majority of billboard warning statements must be deemed violative of the Order since they are not readily visible to the drivers and passengers of passing automobiles, irrespective of vehicle speed, distance from the highway, or other placement.

First of all, there is nothing in the Order to suggest a specific, objective test for "clear and conspicuous disclosure" in some advertising media but an unspecified, amorphous, subjective test in others. Indeed, Section C of the Order is clear in stating that its definition of "clear and conspicuous disclosure" is not limited to that Section but operates "for the purposes of this Order." By invoking a standard of clear and conspicuous disclosure divorced from the Order's detailed specifications, the Staff's approach

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(footnote continued)

penalty action. The uncertainty stems from the pendency before the Commission of a petition brought by John Banzof to reopen the Order in the area of billboards. The Staff has suggested that it may defer any action in the area of billboards until the Banzof petition is resolved. It is our view that any over-all settlement must for future compliance deal with this billboard question in definitive fashion.

would defeat the cardinal objective that the Order was designed to accomplish--the particularization of specific and particular disclosure not subject to continuing dispute and controversy.

Moreover, in the course of negotiations, a specific mock-up of what is now contained in Section D was prepared and agreed upon by the Staff and respondents. It was expressly understood that this mock-up accurately reflected the approach on which the Staff and respondents had concurred to be included in the Order

Recommendations For Future Compliance And Settlement With Respect T Billboards

We are prepared to recommend any reasonable suggestions that the Staff might offer that do not depart from the basic predicates of Paragraph D or curtail the use of billboard advertising. No recommendations have yet been offered by the Staff.

We are prepared to recommend for the future as part of an overall settlement a reasonable increase in the size of the letters in the warning statement for the billboards, not to exceed an increase to 150% of the specified sizes in the Order.

Here again there must be adequate recognition of the fact that any changes to be included on billboards cannot

be accomplished without the provision of adequate lead time for those changes.

VI. Foreign Language Warning Statement

On August 9, 1973, the Commission published in the Federal Register*/ an "Enforcement Policy Statement" announcing that, in previously issued Commission orders requiring "'clear and conspicuous disclosure' of certain information, that disclosure must be in the same language as that principally used in the advertisements and sales materials involved." Shortly thereafter, the Staff approached the respondents to request that they prepare a Spanish version of the warning statement for use in Spanish language advertisements. The respondents acceded to that request. By December 10, 1973, the respondents had been recommended a Spanish translation, prepared by a university language expert, and, some time thereafter, that warning statement began appearing in Spanish in Spanish language advertisements.

The Staff now insists that all foreign language advertisements containing an English language warning statement published since the Commission's "Enforcement Policy Statement" are in violation of the Order. It further maintains

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*/ 38 F.R. 21494-21495.

that all advertisements containing Spanish warning statements constitute violations because their translation of the warning is incorrect as to two words.

We know of no legal principle which permits the Commission, acting unilaterally, to amend the terms of an Order that has resulted from the consent of the respondents and the Commission. Therefore, any requirement that the respondents use a foreign language warning statement can derive only from the provisions of the Order.

Fairly read, the Order contains no such provision. If anything, it compels the respondents to present the warning statement only in the English language. Section C.1 requires that "The language of the warning statement shall be precisely as prescribed by Congress in Section 4 of the Public Health Cigarette Smoking Act of 1969." (Emphasis added.) Since Section 4 of the Act presents the warning statement in the English language, it is clear that the respondents are directed to do likewise.

Since the Order does not require a foreign language warning statement, a fortiori it cannot require any particular translation when the respondents voluntarily agree to use a foreign language warning statement.

Nevertheless, we have over a period of months advised the Staff that as part of an overall settlement the

respondents are willing to undertake to put the warning statement in foreign language advertisements in the same foreign language, as translated by an independent language expert, provided that formal assurance is given that doing so shall not be deemed by some future Compliance Staff to be in violation of Section C of the Order.

In summary, to avoid continued dispute in the future that will equally tax the resources of the Commission and the respondents, the six basic issues summarized must initially be resolved if they can on the suggestions advanced.

Once that is accomplished, the number and extent of specific alleged past violations of the Order, properly interpreted, can be readily identified as to each respondent and evaluated in terms of their particular circumstance and judicial rules as to their possible injury to the public. Both the Staff and co-counsel have during this extensive cooperative investigation largely identified these particular items according to their respective views as to the interpretation to be given to the several provisions of the Order.

Thereafter, whatever are available techniques for implementing the agreed upon changes, and operating techniques for changes to control future compliance, can be developed.

But complete understanding as to how these Orders ought to be complied with in the future, in relation to millions of dollars of advertising and promotional materials, is a sine qua non for any settlement and necessarily both the initial and paramount area of settlement to be determined.

Attachment A--Exhibits to Statement

EXHIBIT B

ORDER

I.

IT IS ORDERED that respondent Brown and Williamson Tobacco Corporation, a corporation, its successors and assigns and respondent's officers, agents, representatives and employees directly or through any corporation, subsidiary, division or other device, in connection with the offering for sale, sale or distribution of cigarettes in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from advertising any such cigarette unless respondent makes in all advertisements of such cigarette a clear and conspicuous disclosure of the statement prescribed in Section 4 of the Public Health Cigarette Smoking Act of 1969 (Public Law 91-222) which reads:

"Warning: The Surgeon General Has Determined That Cigarette Smoking Is Dangerous to Your Health."

A. For the purposes of this Order, the term "cigarette" shall mean (A) any roll of tobacco wrapped in paper or in any substance not containing tobacco, and (B) any roll of tobacco wrapped in any substance containing tobacco which, because of its appearance, the type of tobacco used in the filler, or its packaging and labeling, is likely to be offered to, or purchased by, consumers as a cigarette described in subparagraph (A).

B. For the purposes of this Order, the term "advertisement" shall mean all advertising in newspapers, magazines, and other periodicals published and distributed in the United States and other periodicals distributed primarily to members or units of the Armed Forces of the United States located abroad, and advertisements appearing on billboards placed or located within the United States and in other materials as specified in Sections D, E, and F.

C. For the purposes of this Order, the term "clear and conspicuous disclosure" shall mean that

1. The language of the warning statement shall be precisely as prescribed by Congress in Section 4 of the Public Health Cigarette Smoking Act of 1969.

2. The warning statement shall be set in two horizontal lines parallel with the base of the advertisement, separated by leading equivalent to the lower case "x-height", excluding the ascending and descending

letters, of the particular type size. In any case where the width of an advertisement in any printed medium is too narrow because of the columnar format, the warning statement may appear in three lines provided there is full compliance with all other requirements in this definition.

3. The warning statement in newspaper, magazine, and other periodical advertisements shall appear in Univers 47 (Fdy) type style. The type size to be employed shall be the following:

10-point type.....in newspaper, magazine, and other periodical advertisements of a trim size not larger than 65 square inches.

12-point type.....in newspaper, magazine, and other periodical advertisements of a trim size larger than 65 square inches but not larger than 110 square inches.

14-point type.....in newspaper, magazine, and other periodical advertisements of a trim size larger than 110 square inches but not larger than 180 square inches.

16-point type.....in newspaper, magazine, and other periodical advertisements of a trim size larger than 180 square inches.

A double full-page or a multiple full-page advertisement in any non-tabloid newspaper shall contain a separate warning statement in 16-point type on each page. A double full-page or multiple full-page advertisement in any tabloid newspaper, magazine or other periodical shall not be required to contain more than one warning statement but the type size requirement shall be determined by the total aggregated size of the entire advertisement. An advertisement which occupies one full page and part of another page in any newspaper, magazine or other periodical shall not be required to contain more than one warning statement, but the type size requirement shall be determined by the total aggregated size of the entire advertisement, and the warning statement shall appear on the full page on which the advertisement appears. An advertisement which occupies part of each of two or more pages in any newspaper, magazine or other periodical shall not be required to contain more than one warning statement, but the type size requirement shall be determined by the total aggregated size of the entire advertisement, and the warning statement shall appear on that page which contains the greater (or greatest) part of the advertisement.

4. Every warning statement shall be set in a ruled rectangle. The size of the rectangle shall be determined by providing at both ends and at both top and bottom a space between the type block and the enclosing rule not less than the following spaces: where 10-point type is used in the warning statement, the rule shall be 8-points away from the type block; where 12-point type is used in the warning statement, the rule shall be 10-points away from the type block; where 14-point type is used in the warning statement, the rule shall be 12-points away from the type block; and where 16-point type is used in the warning statement, the rule shall be 14-points away from the type block. The width of the rule enclosing the rectangle shall be 1/4-point where 10-point type is used in the warning statment; 1/2-point where 12-point type is used in the warning statement; 3/4-point where 14-point type is used in the warning statement; and 1-point where 16-point type is used in the warning statement.

5. The warning statement shall be printed in black against a solid white background within the rectangle, and the enclosing rule shall be printed in black.

6. The warning statement in its rectangle in any newspaper, magazine, or other periodical advertisement shall be a separate element in each advertisement and shall not contain or include any part of any picture, design, illustration or text within the advertisement. The warning statement in its rectangle shall not be contained or included as an integral part of any specific pictorial design or illustration; in particular, it shall not be made a constituent part of a reproduction of the package of cigarettes. The warning statement in its rectangle may be printed or superimposed upon any pictorial background portion of any advertisement.

7. The warning statement in its rectangle in any newspaper, magazine, or other periodical advertisement may be positioned anywhere within the trim area of the advertisement, but shall not be positioned in the margin of any advertisement. The rectangle shall not be positioned immediately next to, or immediately contiguous to, any rectangular designs, elements, or similar geometric forms (other than a picture of the cigarette package) or immediately contiguous to any textual matter appearing in the advertisement.

8. Blurring or illegibility of the warning statement in its rectangle occurring for reasons beyond the control of the respondent shall not be in violation of this Order.

D. On billboards of a size 24-sheets and larger, the type size of the warning statement shall be not less than 2 inches in height, and the rectangle and the enclosing rule shall be of a size, shape, contrast, and placement, proportionately corresponding to those specified in Subsections C-1, -2, -4, -5, -6, and -7 for newspaper, magazine, and other periodical advertisements of a trim size larger than 180 square inches. On billboards of a size 6-, 7-, and 8-sheets the type size shall be not less than 3/4 inches, on those of a size 2- through 5-sheets the type size shall be not less than 1/2 inch, and the rectangle and the enclosing rule shall be of a size, shape, contrast and placement, proportionately corresponding to those specified in Subsections C-1, -2, -4, -5, -6, and -7 for newspaper, magazine, and other periodical advertisements of a trim size larger than 180 square inches. On 1-sheet billboards the type size shall be not less than 24-points, and the rectangle and the enclosing rule shall be of a size, shape, contrast and placement, proportionately corresponding to those specified in Subsections C-1, -2, -4, -5, -6 and -7 for newspaper, magazine, and other periodical advertisements of a trim size larger than 180 square inches. On all public transit side cards of any shape the type size shall be not less than 18-points, and the rectangle and the enclosing rule shall be of a size, shape, contrast and placement, proportionately corresponding to those specified in Subsections C-1, -2, -4, -5, -6, and -7 for newspaper, magazine, and other periodical advertisements of a trim size larger than 180 square inches. All public transit end cards shall comply with the minimum requirements for 1-sheet billboards. The type style on any billboard or transit card shall be Univers 47 (Fdy) or a similar font.

E. On all point-of-sale promotional materials exhibited to cigarette purchasers, which have a surface containing an advertising display area of more than 36 square inches, the warning statement within its rectangle shall be included in a type size proportional to the type size specified in the nearest page size category for newspaper, magazine, and other periodical advertisements, as specified in Subsections C-1, -2, -3, -4, -5, -6, and -7. In determining the size of the advertising display area in point-of-sale promotional materials consisting of two or more pages, the total advertising display area of each page on which any printed or graphic material appears shall be aggregated, and where the aggregate of the advertising display area, on which any printed or graphic material appears, exceeds 36 square inches, the warning statement within its rectangle shall be placed on one of those pages and proportionalized to the size of that page in accordance with Section C. The warning statement shall not be required on any non-media

advertising and promotional materials offered or given to consumers; nor shall the warning statement be required on any promotional materials which are not for public display or public consumer exposure, and are distributed to cigarette wholesalers, dealers, and merchants.

F. All advertising contained in non-point-of-sale leaflets, direct-mail circulars, paperback book inserts, and programs shall contain the warning statement within its rectangle in a type size proportional to the type size specified in the nearest page size category for newspaper, magazine, and other periodical advertisements, as specified in Subsections C-1, -2, -3, -4, -5, -6, and -7.

G. Sections C, D, E, and F of this Order shall become effective sixty (60) days after it is finally issued, but to meet the general and ordinary deadlines for submission of advertising copy established by the medium by or in which the advertisement is to appear, the requirements of Sections C, D, E, and F shall not be applicable (a) to newspaper, magazine, or other periodical advertising for which the closing date on which an advertiser must, according to the regular schedule of that newspaper, magazine, or other periodical, deliver the advertising material in final form to the printer, to the publisher, or as to spectacolor-type, to the production house, is less than forty-five (45) days after the date on which this Order shall become effective; (b) to advertising appearing on billboards for which copy must, according to the earliest practical date for replacement, be delivered in final form to the printer or painted or assembled on such billboards less than forty-five (45) days after the date on which this Order shall become effective, but in any event, as to advertising appearing on billboards Sections C, D, E, and F shall become applicable one hundred eighty (180) days from the date this Order shall become effective; (c) to advertising printed on non-point-of-sale leaflets, direct-mail circulars, paperback book inserts, and programs which is delivered in final form to the printer less than forty-five (45) days after the date on which this Order shall become effective, but in any event, as to advertising printed on non-point-of-sale leaflets, direct-mail circulars, paperback book inserts, and programs, Sections C, D, E, and F shall become applicable one hundred forty (140) days from the date this Order shall become effective; or (d) to point-of-sale promotional materials exhibited to cigarette purchasers, which have a surface containing an advertising display area of more than 36 square inches, delivered in final form to the printer less than forty-five (45) days from the date this Order shall become effective.

H. This Order shall not be applicable to signs on factories, plants, warehouses, and other facilities related to the manufacture or factory storage of cigarettes, to corporate or financial reports, or to employment advertising, or to advertising in tobacco trade publications not circulated to consumers.

A 437

Attachment A--Exhibits to Statement

EXHIBIT C

B

FEDERAL TRADE COMMISSION
WASHINGTON D C 20580

OF THE SECRETARY

DEC 20 1972

Brown & Williamson Tobacco
Corporation,
1600 West Hill Street,
Louisville, Kentucky. 40201

Attention: De Baun Bryant,
Vice President and
General Counsel.

Re: Brown & Williamson Tobacco
Corporation,
Docket C-2133.

Dear Mr. Bryant:

The Commission is in receipt of your communication dated August 29, 1972, with attached exhibits, which you filed as a report showing the manner and form of your compliance with the order to cease and desist issued on March 30, 1972, in the above case.

The Commission has reviewed the report of compliance and has concluded, on the assumption that the information submitted is accurate and complete, that no compliance action by the Commission is indicated at this time. The Commission will not be precluded, however, from instituting appropriate action should it subsequently appear that such information is inaccurate or incomplete. In addition, the Commission may at any time reconsider, revoke, or rescind such determination should it subsequently appear that such information is inaccurate or incomplete, or if action had been taken in violation of the terms of the order.

By direction of the Commission.

Chas. A. Tobin

Charles A. Tobin,
Secretary.

EXHIBIT D

[For convenience of Court and Counsel this exhibit is bound in on the opposite page.]

OVERSIZE FOLDOUT(S) FOUND HERE IN
THE PRINTED EDITION OF THIS VOLUME
ARE FOUND FOLLOWING THE LAST PAGE
OF TEXT IN THIS MICROFICHE EDITION

SEE FOLDOUT NO. 1

Attachment A--Exhibits to Statement

EXHIBIT E

POINT-OF-SALE

Section G of the Order requires that point-of-sale advertising materials larger than 36 square inches sent to the printer after July 14, 1972, contain the stipulated form of health warning. During the period of time encompassed by this Report, no point-of-sale materials of the type requiring the new warning have been utilized by the Company. However, on August 16, 1972 point-of-sale material prepared for Benson & Hedges was delivered to the printer for use in November and December of 1972. A proof of such material is annexed hereto as Exhibit 5. The proof consists of a silver print of the header card along with the display piece.

100 new sweepstakes from Benson & Hedges 100's.

Choose from these and 88 more.



carpeting



tandem bicycle



deep sea fishing in Mexico*



cold cuts



pool table



car washes



filet mignon



pinball machine



birdseed & feeding station



motor bike



tent



stereo hi-fi outfit

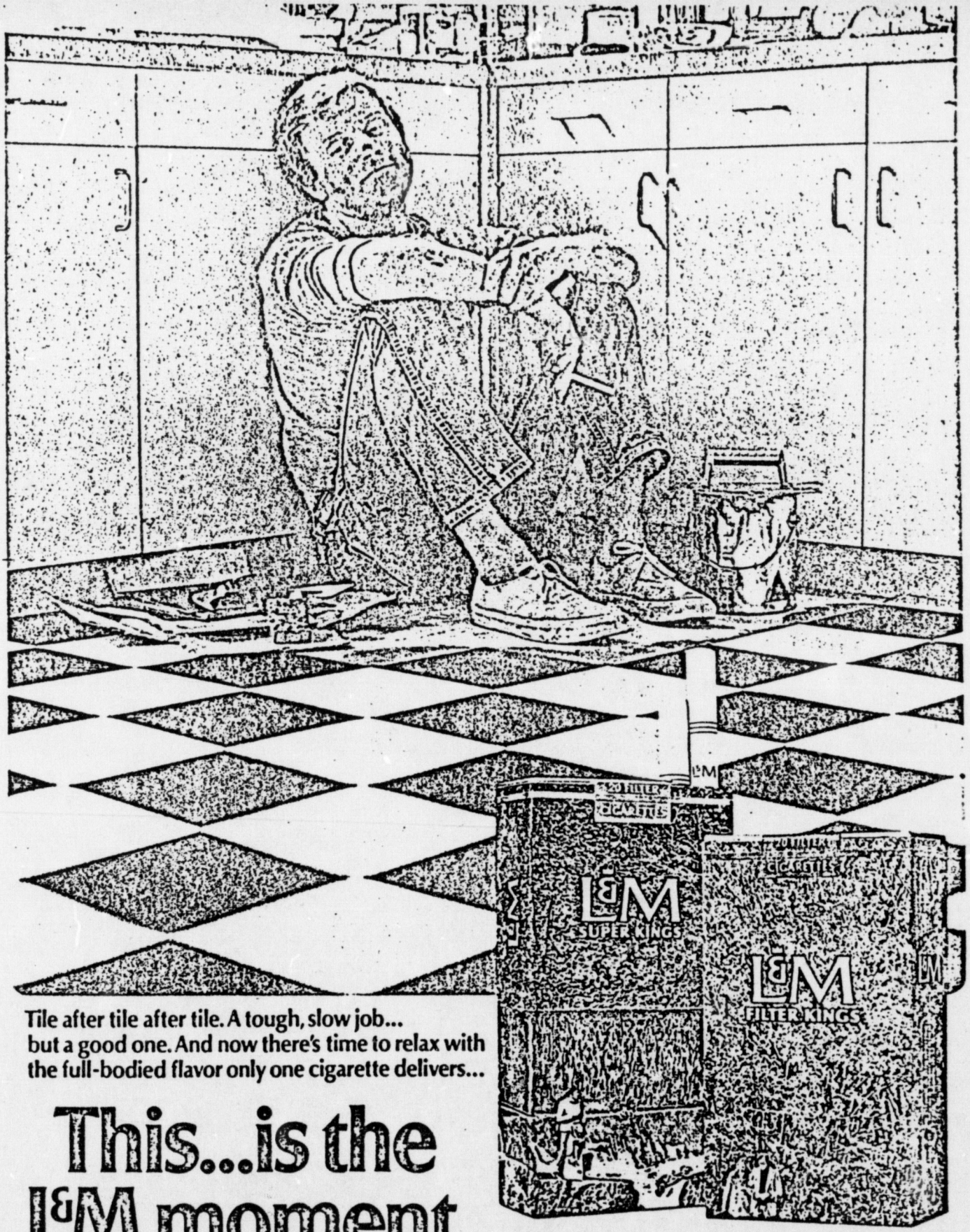
*Plus travel and accommodations for

Warning: The Surgeon General Has Determined That Cigarette Smoking Is Dangerous to Your Health.

Regular: 19 mg. "tar," 1.4 mg. nicotine. Menthol: 20 mg. "tar," 1.4 mg. nicotine, av. per cigarette, FTC Report. Apr.

EXHIBIT F

[For convenience of Court and Counsel this exhibit is bound in on the opposite page.]



Tile after tile after tile. A tough, slow job...
but a good one. And now there's time to relax with
the full-bodied flavor only one cigarette delivers...

This...is the L&M moment.

RICH, RICH L&M

Warning: The Surgeon General Has Determined That Cigarette Smoking Is Dangerous to Your Health.

M-2411C
This advertisement appears in

Attachment A--Exhibits to Statement

EXHIBIT G

The first photostat Kent advertisement (9 of 12) is a proof which was sent to newspapers. The second photostat Kent advertisement (10 of 12) is a tear sheet of the actual newspaper advertisement. Comparison between the warning statement size in the two photostats clearly indicates the occurrence of shrinkage.

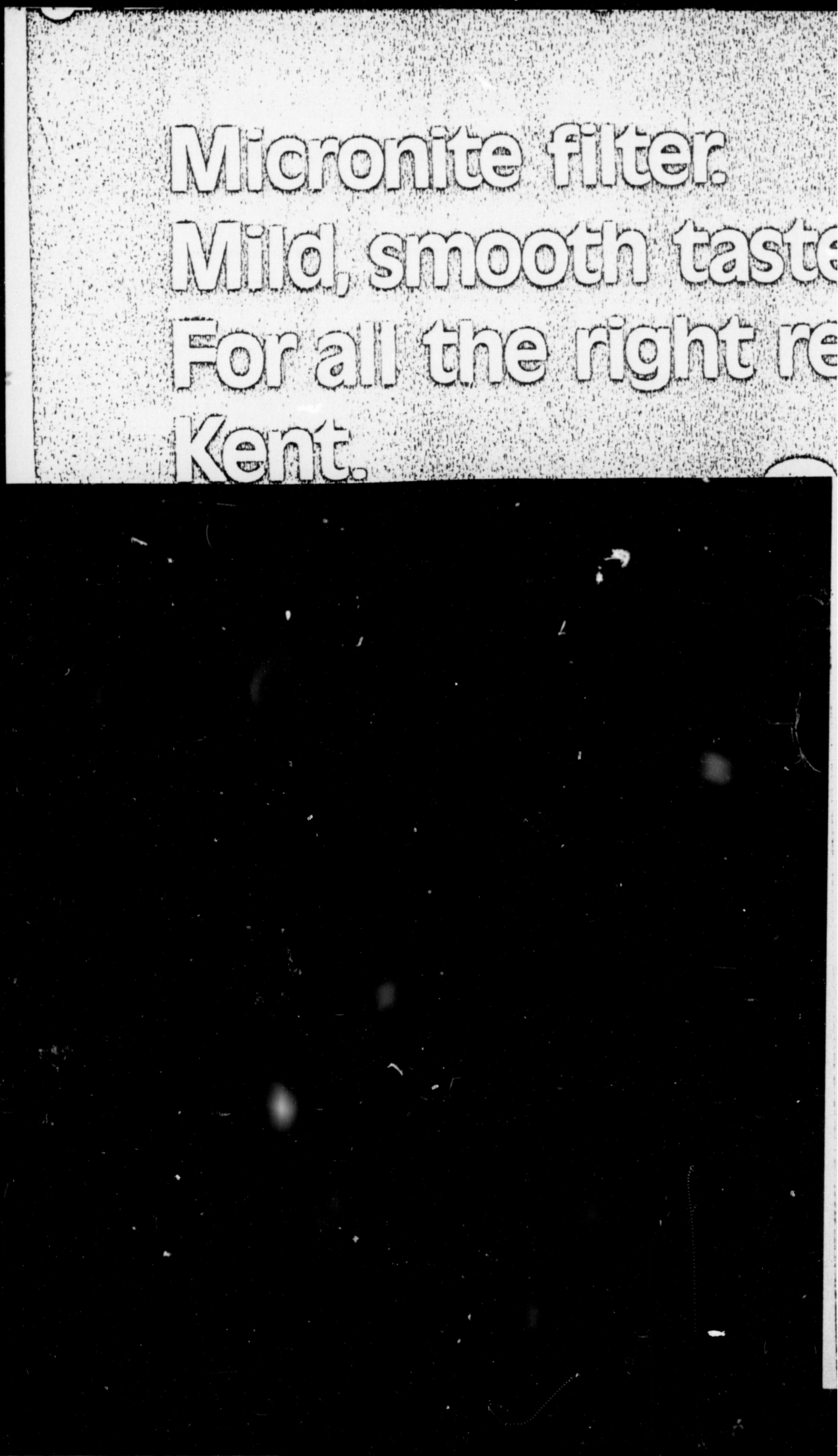

Micronite filter.
Mild, smooth taste
For all the right re
Kent.

EXHIBIT 3

FTC DOCKET NO.
C-2180

COMPLIANCE REPORT

(9 of 12)

asons.



Warning: The Surgeon General Has Determined That Cigarette Smoking Is Dangerous to Your Health

Micronite filter.
Mild, smooth taste.
For all the right reasons.
Kent.

EXHIBIT

FTC DOCKET
C-2180

COMPLIANCE

(10 of

4445

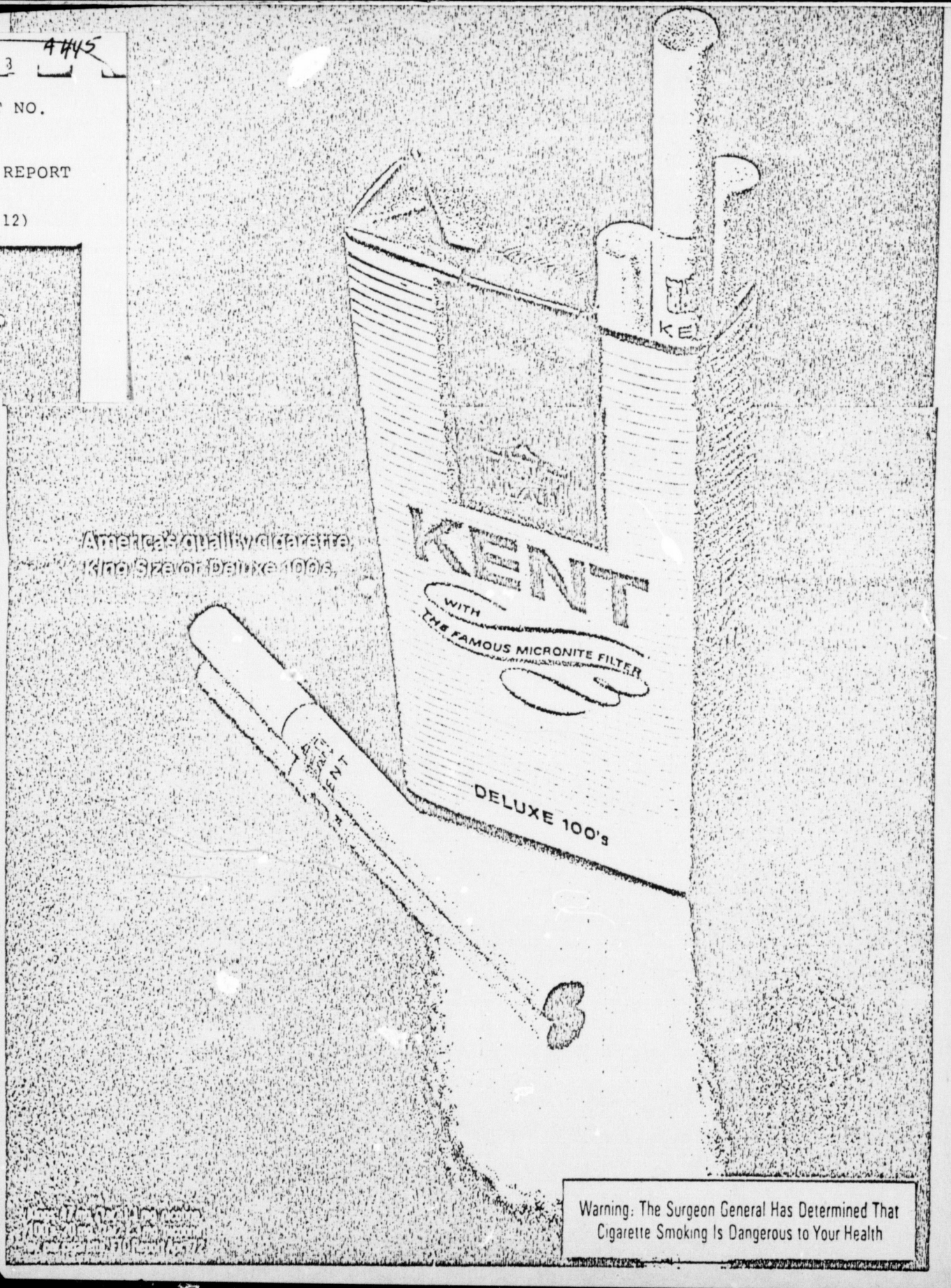
EXHIBIT 3

DOCKET NO.
C-2180

LIANCE REPORT

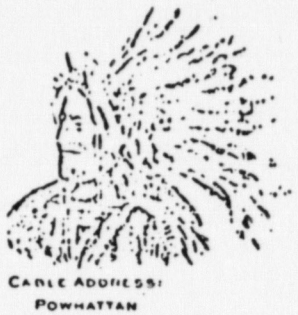
(10 of 12)

ns.



Attachment A--Exhibits to Statement

EXHIBIT H



CABLE ADDRESS:
POWHATTAN

The American Tobacco Company
A DIVISION OF AMERICAN BRANDS, INC.
245 Park Avenue
New York, N.Y. 10017

July 10, 1972

Memorandum to -

Mr. Tom Cooney
SSC&B

Mr. Ira Rothbaum
SSC&B

Mr. Jack Conroy
F. William Free & Co., Inc.

You have all been advised that all of our advertising in newspapers commencing July 13 as well as any magazine advertising with a closing date of July 13 or thereafter shall contain a "precaution notice". This memo is to simply explain that it is mandatory that all of our advertising so described contains said caution notice. There can be no excuse for missing an insertion in any paper or magazine after July 13.

Would you, therefore, double check making sure that all necessary steps have been taken to insure compliance.

William J. Moore
Deputy Advertising Director

WJM:ca
cc: Mr. Cohen
Mr. Jackson
Mr. Dugan

MEMORANDUM

TO: MR. J. W. GROOME
MR. R. L. JOHNSON
MR. D. S. JOHNSTON
MR. M. O. WILLSON
MR. V. C. BROACH
MR. B. L. BROECKER
MR. D. R. DONINGER
MR. J. L. HENDRICKS
MR. L. L. MUDD
MR. C. E. SMOOT
MR. G. A. WOODWARD

FROM: MR. R. A. PITTMAN
DATE: April 13, 1972

The Consent Decree regarding the use of a warning clause in advertising has been signed and becomes effective 60 days following the March 30, 1972 date of signing. You have previously been furnished with copies of this Consent Decree and with a type and printing guide for the warning clause.

The placements of warnings in advertising is no longer a voluntary matter. Signing the Consent Decree means that we now have a requirement which is, in essence, a law. It is therefore incumbent on each Brand Group to see that all materials comply with the regulation and that omissions and errors do not occur.

R. A. P.

Attachment A--Exhibits to Statement

July 10, 1972

CIGARETTE WARNING STATEMENT REQUIREMENTS

Following are the requirements for the new warning statement disclosure which affects cigarette advertising and point-of-sale promotion material.

I. GENERAL REQUIREMENTS (Newspapers, Magazines, Periodicals, Billboards, Point-of-sale).

A. Statement To Be Used:

Warning: The Surgeon General Has Determined That Cigarette Smoking Is Dangerous to Your Health.

B. Format

The warning statement shall be set in two horizontal lines parallel with the base of the advertisement separated by a leading equivalent to the lower case "X-height" excluding ascending (i.e. "d") and descending (i.e. "g") letters of the particular type size. When the width of an ad is too narrow because of the columnar format, the warning statement may appear in three lines, provided there is full compliance with all other requirements.

C. Type Face

Univers 47 (Foundry)

D. Warning Statement Background

Warning statement and rule in black with solid white (no tone) background.

E. Warning Statement Position

Must be positioned within trim area and cannot be part of the border.

It must be treated as a separate element and in no way relate to a visual (including pack) element, design, or copy block.

It cannot be next to or immediately contiguous to any rectangular form that is of similar shape.

The rectangle should be located in the lower right hand corner. It is possible, where unusual design or background conditions exist, to move the rectangle to another part of the ad. This will be a rare situation and creative people are advised to check this out with the Account Group.

II. NEWSPAPERS, MAGAZINES, PERIODICALS

A. Type Size

10 point - newspapers, magazine, and periodical advertisements with tri... size not larger than 65 square inches.

12 point - newspapers, magazine, and periodical advertisements with trim size not larger than 65 but smaller than 110 square inches

14 point - newspapers, magazine, and periodical advertisements with trim size not larger than 110 but smaller than 180 square inches

16 point - newspapers, magazine, and periodical advertisements with trim size larger than 180 square inches.

NOTE: A double full-page or multiple full page in any newspaper excluding tabloids gets a warning statement in 16 point type on each page.

For tabloids, only one warning statement is required; size is determined by total aggregated size of entire ad.

Full page and partial adjoining units, double half page horizontal and other similar layouts require only one warning statement which goes in the largest unit. Type size based on total aggregated size of the ad.

B. Rectangle Size

The warning statement will be set in a ruled rectangle size at top bottom and sides varies according to type size as follows:

10 point - Rule should be 8 points away from copy block

12 point - Rule should be 10 points away from copy block

14 point - Rule should be 12 points away from copy block

16 point - Rule should be 14 points away from copy block

C. Width of Rule

10 point type - 1/4 point width

12 point type - 1/2 point width

14 point type - 3/4 point width

16 point type - 1 point width

III. BILLBOARDS

A. Type Size

1 Sheet - Not less than 24 points
2-5 Sheets - Not less than 1/2 inch
6-8 Sheets - Not less than 3/4 inch
24 Sheets and Larger - Not less than 2 inches

B. Rectangle Size

The enclosing rule shall be a size, shape, contrast, placement, position, proportionately corresponding to the requirements of magazine advertisements of a trim size larger than 180 square inches.

For example, the distance between the rule and the type size is in the same proportion as 14 points separation is to 16 point type size.

Example

$$\frac{X}{24 \text{ pts}} \quad \text{as} \quad \frac{14 \text{ pts}}{16 \text{ pts}}$$

C. Width of Rule

The width of rule enclosing the rectangle shall correspond proportionately to the requirements of Magazine advertisements of a trim size larger than 180 square inches.

For example, the width of rule and the type size is in the same proportion as 1 point width is to 16 point type.

Example

$$\frac{X}{2''} \quad \text{as} \quad \frac{1 \text{ pt}}{16 \text{ pts}}$$

IV. PUBLIC TRANSIT SIDE CARDS OF ANY SIZE

A. Type Size

Type shall not be less than 18 points

B. Rectangle Size

The enclosing rule shall be a size, shape, contrast, placement, position, proportionately corresponding to the requirements of magazine advertisements of a trim size larger than 180 square inches.

For example, the distance between the rule and the type size is in the same proportion as 14 points separation is to 16 point type size.

Example

$$\frac{X}{18 \text{ pts}} \quad \text{as} \quad \frac{14 \text{ pts}}{16 \text{ pts}}$$

C. Width of Rule

The width of rule enclosing the rectangle shall correspond proportionately to the requirements of Magazine advertisements of a trim size larger than 180 square inches.

For example, the width of rule and the type size is in the same proportion as 1 point width is to 16 point type.

Example

$$\frac{X}{18 \text{ Pts}} \quad \text{as} \quad \frac{1 \text{ pt}}{16 \text{ pts}}$$

V. PUBLIC TRANSIT END CARDS

All public transit end cards shall comply with the minimum requirements for 1 - sheet billboards.
(See sections III A,B, and C)

VI. POINT-OF-SALE PROMOTIONAL MATERIAL

On all point-of-sale promotional material with an advertising display area of more than 36 square inches, warning statement requirements are the same as those for newspapers, magazines, and periodicals.
(See sections II A, B, and C)

VII. MISCELLANEOUS

All advertising contained in non point-of-sale leaflets, direct mail circulars, paperback book inserts, and programs should comply to warning statement requirements for newspapers, magazines, and periodicals.
(See sections II A, B, and C.)

Attachment A--Exhibits to Statement

December 11, 1973

TO: J. AUCONE
P. COLE
H. KAPLAN
C. COPPA
W. TREUSCH
R. MINICUS
D. CLARK
J. LINDER
C. CAMAMIS

RE: L & M ADVERTISING - LEGAL REQUIREMENTS

Assurance of the accuracy of such mundane but critical items as tar-nicotine statements and the Surgeon General's warning is an absolute requirement for anyone working on this account.

One mistake is the limit, and we've already chalked one up. Any further mistakes, slip-ups, etc., etc., will not be accorded much sympathy from this quarter.

Strong letter to follow.

CLARK BLACK

/wi

Attachment A--Exhibits to Statement

EXHIBIT I

ADVERTISING (defined as non-promotional campaign ads including magazine, newspaper, supplement, outdoor, program and trade ads)

1. Each advertising keyline presented by the Agency to the Brand Manager for approval shall be accompanied by an exact size photostat of that keyline. This photostat shall have been initialed by the following agency personnel:
   a. Agency Legal - to signify all legal aspects have been reviewed.
   b. Agency Print Service - to signify model releases have been secured and that required tar and nicotine and Health Warning depictions are correct according to standard.
   c. Agency Client Service - to signify overall review of ad.
2. The Brand Manager, upon approving the keyline, shall initial the photostat to indicate that he has checked for proper tar and nicotine and Health Warning depictions and has specifically reviewed the material.
3. The Brand Manager shall submit directly to Alex Holtzman the initialed photostat for legal review.
4. Legal approval shall be assumed if the Brand Manager is not notified of disapproval within four business days of the date of submission to Mr. Holtzman. All photostats will be returned to the Brand Manager with approvals initialed by Philip Morris Legal.
5. It will no longer be necessary for the Brand Manager to submit engraver's proofs for legal approval. The Brand Manager should, however, continue to route engraver's proofs to Mr. Cremin and Mr. Morgan in accordance with normal operating procedures.

6. The agency cannot release materials to publications without the approval by the Brand Manager of engraver's proofs. The Brand Manager cannot approve proofs without possession of the fully initialed photostat discussed above.

7. Each Brand Manager is responsible for establishing and maintaining an orderly records system regarding the submission and approval of materials.

PROMOTIONAL ADVERTISING (defined as advertising of consumer or trade offers such as liquidators, sweepstakes, etc.)

1. The Brand Manager shall submit to Alex Holtzman a concept outline of the promotion. This statement should be submitted as soon as possible and should cover the basic details of the promotion.

2. The Philip Morris Legal staff shall notify the Brand Manager in writing of all legal questions, procedures and conditions relevant to the particular promotion as defined in the concept outline. This notification shall be given within ten business days of the date of submission of the concept outline. The Brand Manager is responsible for meeting the conditions/procedures and answering the questions raised regarding the promotion.

3. From this point, the agency and the Brand Manager shall follow the procedures outlined for non-promotional advertising starting with step #1.

GENERIC P.O.S. MATERIALS (defined as advertising campaign extensions not involving a promotional offer)

1. Each P.O.S. keyline presented by the agency to the Brand Manager for approval shall be accompanied by an exact size photostat of that keyline. This stat shall have been initialed by the following agency personnel:

a. Agency Legal - to signify all legal aspects have been reviewed.

b. Agency Print Service - to signify model releases have been secured and that required tar and nicotine and Health Warning depictions are correct according to standard.

c. Agency Client Service - to signify overall review of materials.

2. The Brand Manager, upon approving the keyline, shall initial the photostat to indicate that he has checked for proper tar and nicotine and Health Warning depictions and has specifically reviewed the materials. In the case of P.O.S. materials, specific review includes checking with Janet Dunne regarding correct size of pieces, etc.

3. The Brand Manager shall submit directly to Alex Holtzman initialed photostat for legal review.

4. Legal approval shall be assumed if the Brand Manager is not notified of disapproval within two business days of the date of submission to Mr. Holtzman. All photostats will be returned to the Brand Manager with approvals initialed by Philip Morris Legal.

5. P.O.S. proofs cannot be approved by the Brand Manager without possession of the fully initialed photostat.

6. Each Brand Manager is responsible for including point-of-sale in his records system for submission and approval of materials.

PROMOTIONAL P.O.S. MATERIALS

1. If the promotional P.O.S. materials are an extension of a media based promotion, the concept outline discussed under "Promotional Advertising" will cover the P.O.S. execution. If the promotion is not media based, the Brand Manager shall submit to Alex Holtzman a concept outline of the promotion as early as possible.
2. As with number 1 above, the notification by Philip Morris Legal of the conditions, procedures and questions regarding the promotion shall be considered done under the "Promotional Advertising" notification for media based promotions. If the promotion outline has been submitted for point-of-sale only, Philip Morris Legal shall notify the Brand Manager of all legal procedures, conditions and questions within ten business days of the date of submission to Mr. Holtzman of the concept outline. The Brand Manager is responsible for meeting these conditions/procedures and answering all questions raised regarding the promotion.
3. From this point, the agency and Brand Manager shall follow the procedures outlined for "Generic P.O.S. Materials", starting with step #1.

A 457

Attachment A--Exhibits to Statement

Warning Notice - Acetate Overlays

May 16, 1972
DISOO



Mr. J. B. Dempster

Robert V. Hall

Confirming our discussion during staff meeting this afternoon, Mr. C. L. Johnson of the Marketing Department turned over 20 approved warning notice acetate overlays to Purchasing for use by us and our suppliers. The first six of these have been turned over to the following staff members:

Mr. C. C. Johnson, Jr.
Mr. J. B. Dempster
Mr. J. B. Glenn
Mr. J. A. Leinster
Mr. M. A. Taylor
Mr. R. V. Hall

The remaining acetate overlays will be turned over to suppliers as required. We shall retain a blotter record of the suppliers who receive the warning notice acetates and the date which they are transmitted.

It is our understanding that we are to audit all mechanical art when it is received from Sales and/or Marketing to ascertain that the warning notice is shown precisely in the format as shown on the acetate overlays and is in the proper size predicated on the consent order guidelines we have in our files. Further, we are to note on the blue copy of the purchase orders concerned that the proper warning notice was shown on mechanical art and also note on the blue copy of the purchase order that warning notice was checked when the proof of the advertising piece was made, if a proof were required.

Any extra acetates we have available will be in the artwork file cabinet outside of J. A. Leinster's office.

Robert V. Hall
Purchasing Department

RVH:bls

cc: Mr. C. L. Johnson

Attachment A--Exhibits to Statement

Lorillard

February 14, 1974

TO: J. R. Ave

FROM: T. H. Mau

RE: Warning Statement & T&N Numbers

This note serves as a review of Lorillard's compliance to the inclusion of the "Warning Statement" and "Tar and Nicotine Numbers" in our brands' advertising material.

In reviewing the history with Brand Managers, Production and Agencies it is our collective recollection that we have complied with the regulations.

For your information, the Marketing Department does several checks to keep material accurate:

- Agency Creative and Account people check for appropriate size and positioning.
- Brand Managers also check for compliance.
- Lorillard Production Department instructs the printing companies (outdoor only) to project the art on camera to be sure that the T&N's will reproduce to the correct size.
- On some occasions we send to outdoor companies (for painted bulletins) a full-sized reproduction of the warning statement to serve as a guide for correct size.

Another fact which has assisted us in compliance is the lack of turnover in both Agency personnel and Brand Management.

We will, of course, continue to closely monitor these mandatories to maintain our record of compliance.

THM:ae T.H.M.

cc: A. Stevens
M. Castman
R. Smith

Attachment A--Exhibits to Statement

EXHIBIT J

Sales Organization Bulletin No. 275

Friday, November 3, 1972

Advertising Material - Surgeon General Notice Requirements

IMPORTANT

Effective November 30, all brand identified material placed must bear the Surgeon General Notice with the following exceptions -

DERINGER Little Cigar Material
HALF AND HALF Smoking Tobacco Display Cartons
Scored or K.D.F. Cartons
Package Fixture Identification Strips
Carton Fixture Identification Strips
Shelf Arrows
Vending Machine Labels
Change Trays and Change Tray Overlays
Military and Merchant Marine Gratis Items
Shopping Bags
Pocket Savers
Vinyl Cases

All other material such as Carton Cards (Regular, Negro, Spanish and Coupon Offer), Shelf Strips, Shelf Talkers (Regular and Coupon Offer), Posters (Regular, Negro, Spanish and Coupon Offer), Decals, Spanish Streamers, Imprinted 3-Carton Displays, Riser Cards, Store Sale Cards (Regular, Heavy Gauge and Blank Area), Store Sale Shelf Talkers (Regular and Blank Area), Header Cards, Brand Identified Guessing Ring Coupons and LUCKY TEN Display Cards (Wheels) which does not bear the Surgeon General Notice is to be destroyed.

Items which are not brand identified, such as 24- and 60-carton display bases, 30-package counter displays, plain white 3-carton bar displays, small white display bases, New Try A Package Cards, "Service Is Our Business" Cards, Store Sale tape, etc., may be used.

If you have any questions regarding an item, refer the matter to your Supervisor for a decision before the item is used.

TAREYTON Filter King Store Sale Advertising Material

Based on the number of frequency calls, a supply of TAREYTON Filter King Store Sale Advertising Material will be forwarded by special-delivery first-class mail to appropriate members of the Sales Organization. There is no additional material available for requisition.

1156

Attachment A--Exhibits to Statement

F. William Free & Company, Inc.

NEW YORK MIAMI LONDON

July 12, 1972

Mr. William J. Moore
The American Tobacco Company
245 Park Avenue
New York, New York 10017

Re: Silva Thins Precaution Notice

Dear Bill,

As requested last Thursday, July 6th, we have advised all newspapers on our schedule to destroy all previous material and run new printing material containing the FTC Caution Notice for all insertions after July 12th. As a matter of fact, all of our revised insertion instructions were mailed by the close of business on July 6th.

For your information, we are attaching a copy of the instructions which were sent directly to the papers. This one was received and acknowledged by the Rochester Times-Union on July 10th.

As an added measure to insure compliance by all papers, we have directed their New York media representatives to follow up.

Also, we have double-checked the entire Silva Thins magazine schedule to be sure that all insertions closing on or after July 13th will contain the required FTC Warning Notice.

Best regards,

Jack Conroy

JAC:pw
Attach.
cc: P. H. Cohen
C. A. Jackson, Jr.
D. R. Dugan

A 461

Attachment A--Exhibits to Statement

Lennen Mee & Company, Inc.

NEW YORK NEW YORK

July 6, 1972

Democrat (M)
Times Union (E)
55 Exchange Street
Rochester, New York 14614

AMERICAN TOBACCO COMPANY-SILVA THINS FILTER

RE: INSERTION SCHEDULE DATED F1672: DATE-JULY 14 INSERTION

ADS SCHEDULED ON JULY 14TH, DO NOT USE AD NO. SUPPLIED ON INSERTION ORDER #F1672. PLEASE USE NEW MATERIAL (COPY COMING FROM NATIONAL GRAPHIC, NEW YORK.) NEW PRINTING MATERIAL CONTAINS FTC WARNING CAUTION.

USE WHICHEVER NEW AD NO. BELOW THAT ACCOMODATES PUBLICATION.

ST-72-566 (2x100)

ST-72-566-1 (3x56)

ST-72-566-2 (4x50)

PLEASE DESTROY ALL PREVIOUS MATERIAL USED PRIOR TO 7/13/72.

ALL ADS THAT RUN AFTER JULY 12TH MUST RUN NEW FTC WARNING CAUTION. REMAINDER OF SCHEDULE STET. PLEASE SEND ACKNOWLEDGEMENT OF THIS MEMO TO WILLIAM ALMQUIST AT ABOVE AGENCY.

Bill Almquist 7/10/72

RECEIVED
JUL 10 19
ROCH. TIMES-
DEMOCRAT & CH
ADV. DE

730 FIFTH AVENUE, NEW YORK 10019, PL 7-0100

SSC and B Inc. *Advertising*

575 LEXINGTON AVENUE • NEW YORK, N.Y. 10022 • 212-688-1600

Senior Vice President

July 13, 1972

Mr. W. J. Moore
Deputy Advertising Manager
The American Tobacco Company
A Division of American Brands, Inc.
245 Park Avenue
New York, New York 10017

Dear Bill:

Re: "Caution" Box Commencement Date

This is in response to your letter of July 10, 1972 regarding the appearance of the "precaution" box notice in newspaper sales messages, appearing on and after July 13, and magazine sales messages with closing dates of July 13 or later.

As you had requested, all New York and Washington newspapers are already running material that includes the "caution" box. For the balance of the newspaper schedule, special procedures have been set up to insure that the correct sales messages appear:

1. New printing material for the July 13 insertions was shipped well in advance (July 6 and 7) so that there would be no last minute crises.

2. Material was accompanied by revised insertion orders explaining the change in the order. (Sample attached.)

3. In addition to the new material and revised insertion order was a special "Important Notice," an affidavit, requesting the newspaper destroy all plastics and other printing material that ran prior to July 13. The signed affidavit must be returned by the newspaper advertising manager to SSC&B's production manager. (Sample attached.)

continued ...

4. As a further precaution, the Agency has requested that all newspapers be contacted by their respective representatives to make certain that the Agency's orders are carried out.

The same procedures are being followed for the changeover in the magazine schedule. In addition, each publication will also receive a letter requesting that "all previously used printing material be returned to the Agency," where it will then be destroyed. (Sample attached.)

As a final precaution, the Agency has issued instructions to its electrotypers (who actually forward all the printing material) to destroy all extra copies of printing material that was forwarded to publications prior to the July 13 closing dates.

Sincerely,

Ira

Ira Rothbaum

IR:BAB
Attachments

SSC and B Inc. *Advertising*

575 LEXINGTON AVENUE • NEW YORK, N. Y. 10022 • 212-603-1600

REVISED INSERTION ORDER

DATE June 22, 1972

To be inserted in the TMN Westchester Rockland County Group Newspapers.

ADVERTISING DEPARTMENT
Westchester Rockland County Group Newspapers,
8 Church St.,
White Plains, N.Y. 10602

PLEASE:
Mail Invoices to:
SSC&B Logistics Department
575 Lexington Avenue - New York 10022
Newsp. Mail checking copies to:
Advertising Checking Bureau in your geographic area.
Magazines. Mail a complete copy of issue containing advertising to SSC&B Logistics Department.

ADVERTISER The American Tobacco Company PRODUCT PALL MALL MILDER TIPPED 100's

IMPORTANT: This cancels and replaces our insertion order dated June 20, 1972 in its entirety. Be sure to follow instructions below.

[illegible] TO CHANGE ADS SCHEDULED TO RUN JULY 22, 1972

PLEASE INSERT ADVERTISING AS FOLLOWS

[illegible] CONFIRMING OUR TELEPHONE CONVERSATION WITH MISS [illegible] ON JULY 10, 1972, FOR ADS APPEARING [illegible] 12, 1972 ONLY.

ADVT	CAPTION	SPACE	DATE OF INSERTIONS
9879	Detroit U.S.Gov.Reg.(Sept.8/20)(Sun.Mag)	3000 Ln.Rate	Run ad in Freedom Pos. only July 8, 1972
9880	Boston U.S.Gov.Reg.(Sept.8/20)(Sun.Mag)	100 Ln.Rate	Run ad in Freedom Pos. which is July 16, 1972
9948	Detroit U.S.Gov.Reg. (Sun.Mag)	100 Ln.Rate	Run ad in Freedom Pos. which is July 16, 1972
9939	Boston U.S.Gov.Reg.(Sept.8/20)(Sun.Mag)	100 Ln.Rate	Run ad in TV Log Pos. on July 10
9950	Detroit U.S.Gov.Reg. (Sun.Mag)	100 Ln.Rate	Run ad in TV Log Pos. on July 12

ADDITIONAL: Most two or more ads are scheduled to run on same dates, ads are not to appear on consec[illegible] pgs. IMPORTANT: It is imperative that you destroy all plastic plates or any other printing [illegible] you may have of PALL MALL GOLD, PALL MALL [illegible], MILDER, MILD, LIGHT 100, and PALL MALL MILD cigarette advertisements in your possession that are prior to a July 12, 1972 insertion [illegible] so that IMPORTANT notice attached to this order to clarify you have complied with this request [illegible] return the letter to Mr. Walter Conway, at SSC&B. This is extremely important to our mutual cl[illegible] American Tobacco Company.

IMPORTANT: Send 3 tear sheets of ads to: Mr. Don Byer, at SSC&B.

IMPORTANT: Please send two tear sheets and bill in duplicate to the above Logistics Dept., at SSC&B.

POSITION (104,000)
1. 52,000 Lines approx. 200 Lines/Day-Mon-Fri. Immediately Atop TV Listing.
2. Top of Advertising Pyramid. A. Pages 2-7 Main News. B. First Second or Third Pages Sport Section.

IMPORTANT: No tobacco or color advertising to appear on same or facing page. Obituary editorials, Death Notices, Doctor's or medical columns or any incompatible editorials or advertising to tobacco should not appear on same page. Position requirements

IMPORTANT: We urgently request a second impression page, where possible, without conflicting with position requirements

PRODUCTION MATERIAL FROM: [illegible] to [illegible], if material to be [illegible] proofs of ads. Each Schedule, or ENGLE, [illegible] EARLY.

FOR ADDITIONAL PRODUCTION MATERIAL FROM [illegible] EARLY.

PROOF HEREWITH: ad-9879-9948 *Please inspect reproduction material immediately. Advise promptly if not satisfactory*

SSC&B: [illegible]

Attachment A--Exhibits to Statement

EXHIBIT K

SSC and B Inc. *Advertising*

575 LEXINGTON AVENUE • NEW YORK, N.Y. 10022 • 212-688-1600

July 13, 1972

It is extremely important to our client, American Brands, Inc. and to us that no cigarette advertising, closing July 13th or after, appears without a caution notice as illustrated below.

> Warning: The Surgeon General Has Determined That Cigarette Smoking Is Dangerous to Your Health.

To make absolutely certain that this cannot occur, would you please return all advertising material (plates, film, etc.) that do not contain this notice and notify me promptly in writing that this has been done.

Thank you very much for your cooperation in this matter.

Yours truly,

Walter E. Conway
Production Manager

WEC:es

important:

ATTENTION ADVERTISING MANAGER

IMPORTANT NOTICE

It is imperative that you destroy all plastic plates or any other printing materials you may have of PALL MALL GOLD, PALL MALL MENTHOL, MERMAID, LTC, LUCKY TEN, and PALL MALL EXTRA MILD advertisements in your possession that ran prior to a July 13, insertion.

From the July 13th insertion on no advertisements are to be run that do not include the "caution box".

> Warning: The Surgeon General Has Determined That Cigarette Smoking Is Dangerous to Your Health.

Will you kindly sign below to signify you have complied with this request and return this letter promptly to Walter Conway of SSC&B, Inc.

This is extremely important. Thank you for your cooperation.

Walter E. Conway
Production Manager
SSC&B, Inc.
575 Lexington Avenue
New York, New York 10022

The material as requested above has been destroyed.

Name of Publication _____

Signature _____

Date _____

A 467

Attachment A--Exhibits to Statement

WILLIAM ESTY COMPANY
INCORPORATED
ADVERTISING

100 EAST 42ND STREET
NEW YORK, N. Y. 10017
697-1600

August 29, 1972

Warning Statement

Mr. A. G. Weber
R. J. Reynolds Tobacco Company
Winston-Salem, North Carolina

Dear Art:

This is to forward for your information a summary of our efforts to insure against any possible mistakes occurring in connection with the change over from the old Warning Statement guidelines (side of the package) to the new Warning Statement guidelines (ruled box in the clear).

With the necessity to include the new Warning Statement requirements in all advertising materials after May 15th, we notified all Out-of-Home posting plants and all hand-held media publishers (magazines, newspapers, supplements, etc.) of the necessity to destroy and/or return any materials which they might have in their possession which contained the old Warning Statement.

This was done to avoid the possibility of some outdoor plant or publisher running WINSTON, SALEM or DORAL advertising materials containing the old Warning Statement by mistake.

Every plant or publisher was initially contacted by letter and requested to either destroy or return all old materials and, in addition, to sign and return to us a letter indicating their compliance. If after an adequate waiting period (10 days) no response was received, a second letter, followed by a telegram, registered letter, and direct phone calls were used until our requests were finally answered.

The following is a summary of our efforts and the total response received to date for each type of media:

1) Newspapers: Four hundred and twenty papers (420) were contacted (total papers currently and previously used by WINSTON, SALEM and DORAL). To date, we have received a signed letter from every one of the 420, stating that they have destroyed all materials containing the old Warning Statement.

2) Jewish Newspapers: The twenty (20) papers that we have used or are using were contacted, and all have returned signed letters of compliance.

3) Spanish Newspapers: The three (3) we have used were contacted, and all returned compliance letters.

4) Black Newspapers: The sixty-six (66) papers that have been used by our Brands were contacted. All forty-nine (49) of the Amalgamated Papers returned signed letters. However, of the seventeen (17) Independents contacted, one (1), The Charlotteville, West Virginia Tribune, has not responded even though numerous letters, telegrams, registered letters, and phone calls have been made to the publisher in an attempt to get them to comply.

5) Baseball Programs: All twenty-three (23) Programs used by Reynolds were contacted, and all have returned signed letters of compliance.

6) '72 Magazines: The sixty-nine (69) publications on the current schedule (all three Brands) including Jewish, Spanish and Black Magazines were contacted, and all returned the old materials they had on hand as well as the signed compliance letters.

7) '71 Magazines: The sixteen (16) magazines, programs, etc. used in previous years, but not being currently used, were contacted and all responded by returning the signed letter and all old materials.

8) Supplements: All Supplements on the current list, as well as used in previous years were contacted, and all eight (8) returned the signed compliance letter and destroyed old materials.

9) Military: All nine (9) military publications used in 1971 and 1972 were contacted and all returned signed compliance letters.

10) 30-Sheet Outdoor Plants: The five hundred and eight-five (585) posting plants used by WINSTON, SALEM and DORAL were contacted. These plants not only destroyed any renewal paper they had on hand, but also scraped clean any boards which might be standing idle with an RJR posting containing the old Warning Statement.

11) 6-Sheet Outdoor Plants: The sixty (60) plants which post 6-Sheets were also contacted, and all followed the same two-step procedure used by the 30-Sheet plants.

12) Misc. Out-of-Home: The fifteen (15) plants which handle buses, transit, commuter, etc. were also contacted, and all destroyed all old materials.

In summation, one thousand two hundred and ninety-four (1,294) magazines, newspapers, programs, supplements and Out-of-Home plants were contacted and requested to either destroy and/or return all old materials and signed return letters indicating their compliance. To date, we have in our files a response from each of them except one Black Independent Newspaper (Charlotteville, West Virginia Tribune) which we are still attempting to contact and receive a response.

Art, if you have any questions or wish to discuss this further, please advise.

Sincerely,

John R. Oxee

JRO:m
cc: Mr. R. B. Hooker
Mr. G. B. Granger

A 469

Attachment A--Exhibits to Statement

EXHIBIT L

WILLIAM ESTY COMPANY
INCORPORATED
ADVERTISING

100 EAST 42ND STREET
NEW YORK, N. Y. 10017
697-1600

April 12, 1973

A Calv- We should retain this or send it to MHC for his retention if we get questioned. JDW 4/24

Mr. J. O. Watson
Marketing Department
R. J. REYNOLDS TOBACCO COMPANY
Winston-Salem, North Carolina 27102

Re: "5 Simple Tests" - Roanoke Times

Dear Jack:

As discussed, this forwards the make-good letter and a copy of subject advertisement as it ran improperly without FTC Statement or Tar and Nicotine Numbers on 4/9-10 in the Roanoke Times.

The make-good appears 4/12-13. Please let me know if you have any questions.

Sincerely,

John H. McCain

JHMcC/cr
Attachments
cc: Mr. T. E. Sandefur
Mr. R. B. Hooker
Mr. S. C. Wooten, Jr.
MR. G.B. GRANGER

A 470

Attachment A--Exhibits to Statement

TIMES-WORLD CORPORATION

THE ROANOKE TIMES
The World-News
GALAX GAZETTE

P. O. Box 2491, Roanoke, Virginia 24010 — Telephone (703) 981-3361

April 11, 1973

RICHARD L. NYSTROM
General Advertising Manager

Mr. John Monz
William Esty Company, Inc.
100 East 42nd Street
New York, New York 10017

Dear Mr. Monz:

This letter is to confirm my phone call to you of April 10 regarding the Winston Cigarette ad which ran in the Roanoke newspapers April 9 p.m. and April 10 a.m. As I related to you, the reproduction material was satisfactory and exactly what we require. The ad was processed correctly but when the negative was made, the Engraving department clipped off the bottom portion of the ad containing the Federal Trade Commission's required information and the Surgeon General's warning portion.

Knowing this could result in problems for William Esty and/or the R. J. Reynolds Tobacco Company, I immediately scheduled a makegood for the entire ad to be published in our papers April 12 p.m. and April 13 a.m., with corrections, of course.

I sincerely regret that this occurred and I do hope that our prompt attention to the matter and this letter will enable you to avoid any future misunderstanding or dissatisfaction concerning the error in this publication. Enclosed please find a tear sheet of the ad as it appeared incorrectly and let me know immediately if there is any other way in which I can be of service to you.

Sincerely,

Richard L. Nystrom

RLN:jop

Enclosures

cc: Mr. C. E. Schloemer, Branham-Moloney, New York
Charlotte Office

A 471

Attachment A--Exhibits to Statement

WILLIAM ESTY COMPANY
INCORPORATED
ADVERTISING

G. ROBERT HOLMÉN
SENIOR VICE PRESIDENT

100 EAST 42ND STREET
NEW YORK, N. Y. 10017
697-1600

March 23, 1973

MR MAX COHN

As INFO.

BGW 3/27

Mr. Arthur G. Weber
Marketing Service Manager
R. J. Reynolds Tobacco Company
Winston-Salem, North Carolina

Dear Art:

This forwards a letter from the Colorado Springs Gazette Telegraph explaining their error on a March 1, 1973 SALEM 2-color newspaper insertion.

Please note that we have obtained a full run makegood due to their omission of the Warning Statement.

Cordially,

G. Robert Holmén

jc/
Attachment

cc: Mr. J. F. Hind

A 472

Attachment A--Exhibits to Statement

GAZETTE-TELEGRAPH

30 S. PROSPECT ST. COLORADO SPRINGS, COLORADO 80901

Post Office Box 1779

Area Code 303
632-4641

Mr. Thomas Reddy, Vice President
William Esty Company
100 E. 42nd Street
New York, N. Y. 10017

March 19, 1973

Re: Salem 85
R. J. Reynolds Tobacco Co.

Dear Mr. Reddy:

Confirming our telephone conversation with regard to the printing error incorporated in the Salem 85 Full Page color ad number P8-791 in our issue of March 1, 1973, an investigation has been completed as to the cause, and we submit the following report.

The printing material your supplier furnished to us consisting of camera ready photo negatives was in perfect condition on delivery and dispatch to our photo engraving department.

In processing the material in our engraving department, the FTC Warning Statement, located at the extreme lower left hand corner of the black-plate film was accidentally sheared off by mistake. Removing excess non-printing areas before shooting the metal plate is a usual practice, and in this specific instance the operator overlooked the statement box.

Subsequently, proofs of camera ready ads do not go out for inner office checking, and although the ad was checked for color matching and register when the press run initially started, in the haste of time the absence of this item was not noticed.

We fully realize the seriousness of this matter, do not in any way place the responsibility on anyone other than ourselves, and offer a complete no-charge makegood run of the ad at any date you may wish to designate.

We will appreciate your consideration in this matter, and trust that the office responsible at the FTC will likewise concur with your understanding.

Cordially,

T. K. Hiltbrand
National Adv. Mgr.

cc: Kevin Kiley - CHCAO - NY

A 473

Attachment A--Exhibits to Statement

R.J.Reynolds Tobacco Company
Winston-Salem, N. C. 27102

RJR

RECEIVED
MAY 14
1973

January 23, 1973

Charles A. Tobin, Esquire
Secretary
Federal Trade Commission
Washington, D. C. 20580

Dear Mr. Tobin:

It has come to our attention that an advertisement for SALEM cigarettes in the January 8, 1973, issue of the Seattle Times was inadvertently run without the required warning statement. The ad in question was run in major newspapers on that date throughout the United States.

The warning statement was omitted from the Seattle Times due to an error committed by the Production Department of the newspaper. Enclosed is the original of a telegram to Reynolds received this date from the paper which attests to that fact.

In order that you will be aware of the steps taken by the Company and its advertising agencies to insure that the warning statement always appears in newspaper advertising, I shall set out below the procedures which are followed:

(1) An insertion order which states when the ad should run, position in the paper preferred, etc., is sent out by the agency to each newspaper in which the ad is to appear. Stamped prominently on the order is the following (in the case of William Esty Company):

"IMPORTANT NOTE

"This advertisement complies with the FTC requirement for a warning statement and tar and nicotine line which must appear in

R.J.Reynolds Tobacco Company
Winston-Salem, N. C. 27102

all cigarette advertising. Check material you receive against this proof to be sure it is correct. Under no circumstances are you to run substitute materials or alter any copy without checking with the William Esty Company."

(2) Proofs of the ad are sent along with the insertion order. The "Important Note" in the insertion order is stamped also on the proof. Enclosed for your information is a copy of the proof of the particular ad run in the Seattle Times on January 8, 1973.

(3) Plastic mats are supplied the newspapers which can be used by them for reproducing an ad. The mats also contain the warning notice.

Notwithstanding the fact that the Company and its agencies supply mats to the newspapers, there are some papers which make their own plates and do not use the mats. This was done by the Seattle Times, and, during the course of making the plates, its Production Department inadvertently omitted the warning statement. Thus, it ignored the specific instructions included in both the insertion order and the proof.

We believe that the Commission would agree that neither R. J. Reynolds Tobacco Company nor its advertising agency, William Esty Company, can be held responsible for the inadvertent human error of the Seattle Times. We have been assured by the newspaper that such mistake will not be repeated in the future.

We trust that the above explanation is satisfactory.

Very truly yours,

Max H. Crohn, Jr.
Secretary

MHC:kam
Enclosures
cc: Allen F. Brauninger, Esq.
bcc: J. F. Hind[illegible]
J. S. Dowde[illegible]
Robert Holmen

Attachment A--Exhibits to Statement

J. J. Kind
Mkt. Dept
3rd floor

IPMWIRA WSL

1-054983A022 01/22/73

TWX SE TIMES

JANUARY 22, 1973 SEATTLE, WASHINGTON

PMS MR. J. F. KIND

MARKETING DEPARTMENT

R.J.REYNOLDS TOBACCO CO

WINSTON-SALEM. N.C.

JANUARY 8 SALEM AD APPEARED WITHOUT THE WARNING BOX. THE PROOF WHICH WAS RECEIVED DID CONTAIN WARNING BOX WHICH INADVERTENTLY WAS NOT(NOTED BY THE PRODUCTION DEPT.

A.O. WINDELL

NATIONAL ADVERTISING MANAGER

THE SEATTLE TIMES

SEATTLE WAI HINGTON

1908 EST

IPMWIRA WSL

WESTERN UNION telegram

DC0092 2SSA EST JAN 23 73 NYD0C8(0041)(1-061771B022-001)PD 01/23/73 2309
ICS IPMNYNA NYK

SUSPECTED DUPLICATE 1-054702A022 NYI 382 IWX SE TIMES
ZCZCJANUARY 22, 1973 SEATTLE, WASHINGTON
PMS MR. TOM REDDY
WM ESTY CO
100 EAST 42ND ST
NEW YORK, N.Y.

BT
JANUARY 8 SALEM AD APPEARED WITHOUT THE WARNING BOX. THE PROOF WHICH WAS RECEIVED DID CONTAIN WARNING BOX WHICH INADVERTENTLY WAS NOT NOTED BY THE PRODUCTION DEPT.
A.O. WINDELL
NATIONAL ADVERTISING MANAGER
65-1351 (PS-4)

THE SEATTLE TIMES
SEATTLE, WASHINGTON

A 477

Attachment A--Exhibits to Statement

p. Color

WILLIAM ESTY COMPANY
INCORPORATED
100 East 42nd Street, New York, N.Y. 10017

NEWSPAPER INSERTION ORDER

ADVERTISING DEPARTMENT

DATED NOV. 29, 1972

PAGE TWO

R. J. REYNOLDS TOBACCO COMPANY - SALEM 65 & SUPER KING SIZE CI

Please insert the enclosed copy for ..... following carefully the schedule and instructions given below. Charge in accordance with contract now in force.

The space indicated below is approximate but should not exceed [illegible] Where shortage of space requires us to publish and bill [illegible] immediately. They should produce good printing results. Advise us promptly if not satisfactory. • Your printing will not be held for [illegible] • Advise us at once if instructions are not clear. • Do not re-size [illegible] Corrections are not permitted to stand but instructions without special instructions from us.

ISSUE	SPACE	COPY NO.	CAPTION	KEY NO.

PRINTING MATERIAL FROM KELLY ELECTROTYPE COMPANY, NEW YORK.

IMPORTANT NOTE

THE NEW ALABAMA AD HAS INCREASED INKING AS SHOWN IN THE ROP NEWSPRINT COLOR INK BOOK, VOL #1 PUBLISHED JANUARY 1972 WAS OPEN WIDE IN PRINTING THIS ADVERTISEMENT. IT IS IMPERATIVE THAT THIS INK BE USED AS IT REPRESENTS THE EXACT (FACSIMILE) COLOR.

IMPORTANT NOTE

This advertisement complies with the FTC requirement for a warning statement and tar and nicotine line which must appear in all cigarette advertising. Check material you receive against this proof to be sure it is correct. Under no circumstances are you to run substitute materials or alter any copy without checking with the William Esty Company.

If unable to insert on the date ordered, kindly notify us at once and wait for new insertion date. No credit can be allowed should this advertisement appear incorrectly or on a date other than that authorized above.

DAILY NEWSPAPERS: A copy of each issue containing the advertisement should be sent promptly to the nearest office of the Advertising Checking Bureau, Inc., and also to the advertiser.

DAILY OTHER THAN DAILY: A copy of each issue containing the advertising should be sent promptly to William Esty Company, Incorporated, and also to the advertiser.

ALSO ORDERED/slp

WILLIAM ESTY COMPANY, Inc. Per .....

A 478

Attachment A--Exhibits to Statement

FROM: WILLIAM ESTY COMPANY FORWARDING,
INCORPORATED
100 East 42nd Street, New York, N. Y. 10017

NEWSPAPER INSERTION ORDER

ADVERTISING DEPARTMENT

DEC 2 1972, 19

TIMES
SEATTLE, WASH. 98111

EVENING

PLEASE HOLD ALL PAINTED MATERIALS IN FILE FOR POSSIBLE REPEAT USE.

Please insert the enclosed copy for R. J. REYNOLDS TOBACCO COMPANY -SALEM 85 & SUPER KING SIZE. CAMEL.
following carefully the schedule and instructions given below. Charge in accordance with contract now in force.

Use the space indicated below to advertise but should not exceed space of ... Where display is specified space to include and fill ... with white space should not be so used as to leave white ... of type. Order number must appear on all invoices and bills ... If the insertion cannot be published as directed, ... the publication may not be responsible to show cause for non-insertion ... without specific instruction given on ...

ISSUE	SPACE	COPY NO.	CAPTION	KEY NO.
LAST OF:	2-COLOR:			
JANUARY 8	FULL PAGE (CENTER OF PAGE)	P6-774	IF YOUR CIGARETTE EVER TASTED.	
JANUARY 22	FULL PAGE (CENTER OF PAGE)	P6-773	CAMEL 4. F.Y.	

DATE: IT IS IMPERATIVE THAT THESE ADS BE INSERTED IN ORDER GIVEN ABOVE.

OPTION: MONDAY THROUGH FRIDAY. PREFER ISSUE WITH THE LEAST AMOUNT OF ADVERTISING.

CONSOLIDATION EDITION PAPERS: (WHERE CHECKED) PREFER TO RUN EVENING OF ONE DAY FOLLOWED BY MORNING OF NEXT DAY. (SUN E OR SUN DAY IS ACCEPTABLE.)

NOTE: DO NOT RUN IN PAPER ISSUED WITH ANY OTHER R. J. REYNOLDS TOBACCO COMPANY PRODUCT E.G. DORAL, VANTAGE, WINSTON OR SALEM CIGARETTES.

POSITION: SPECIFIC REQUESTED: THAT POSITION WHICH WILL PLACE IN THE BEST ADVERTISING ADJACENCY WITH AT THE PUBLISHER'S DISCRETION AND CONSISTENT WITH THE PUBLISHER'S WELL ESTABLISHED POLICIES AND PRACTICES. OUR PREFERENCE IS:

1. PAGE 3 OR 5.
2. BACK PAGE.
3. FRONT 4 BACK OF SECTION.
4. OPPOSITE PAGE OF EDITORIAL INTEREST E.G. FEATURE PAGE, PAGE WITH SMALL OR NONE CLASSIFIED, OR WITH ALL EDITORIAL PAGE.
5. FIRST AND F OR FOURTH PAGE OF SECTION. OPPOSITE SOLID ADVERTISING PAGE.

CONTINUED ON DATE 2

If unable to insert on the date ordered, kindly notify us at once and wait for new insertion date. No credit can be allowed unless this advertisement appears in accordance with the date ordered above.

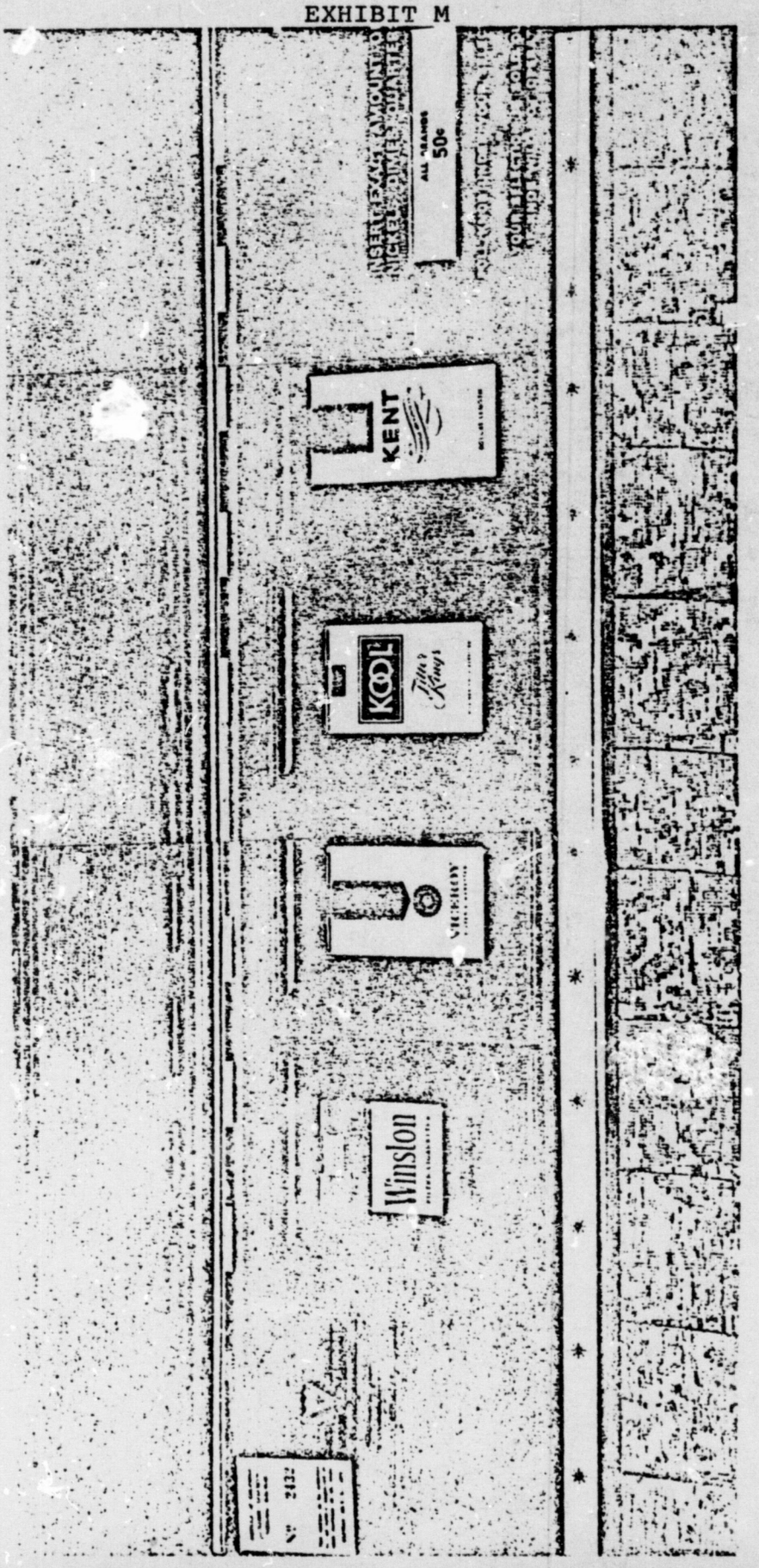
DAILY NEWSPAPERS ONLY: A copy of each issue containing the advertisement should be sent promptly to the nearest office of the Advertising Checking Bureau, Inc., and also to the advertiser.

FOR ALL OTHER PUBLICATIONS: A copy of each issue containing the advertising should be sent promptly to William Esty Company, Incorporated, and also to the advertiser.

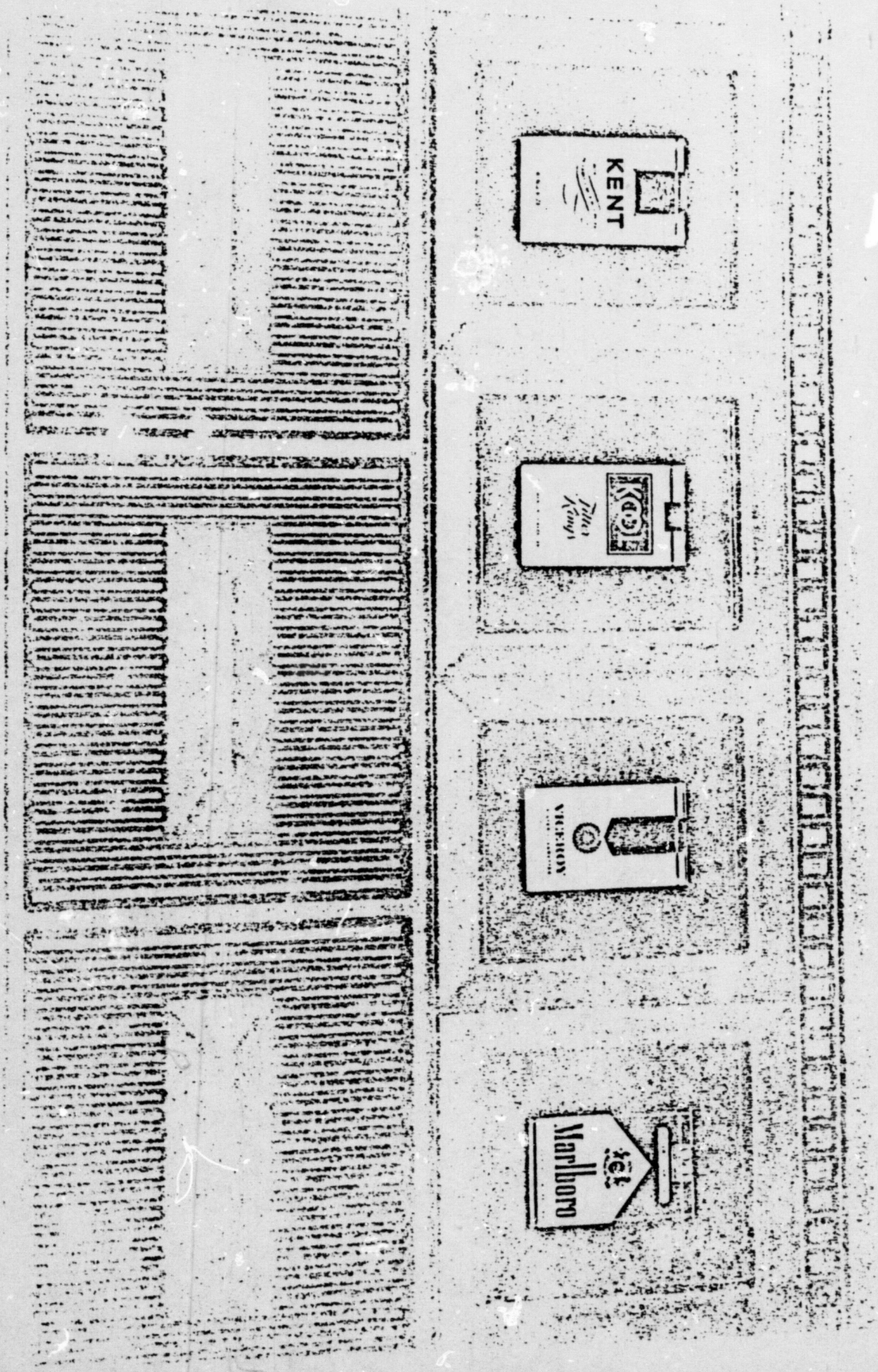
WILLIAM ESTY COMPANY, Inc., Per .....

Attachment A--Exhibits to Statement

EXHIBIT M



Attachment A--Exhibits to Statement



A 481

Attachment A--Exhibits to Statement

EXHIBIT N

Attachment A--Exhibits to Statement

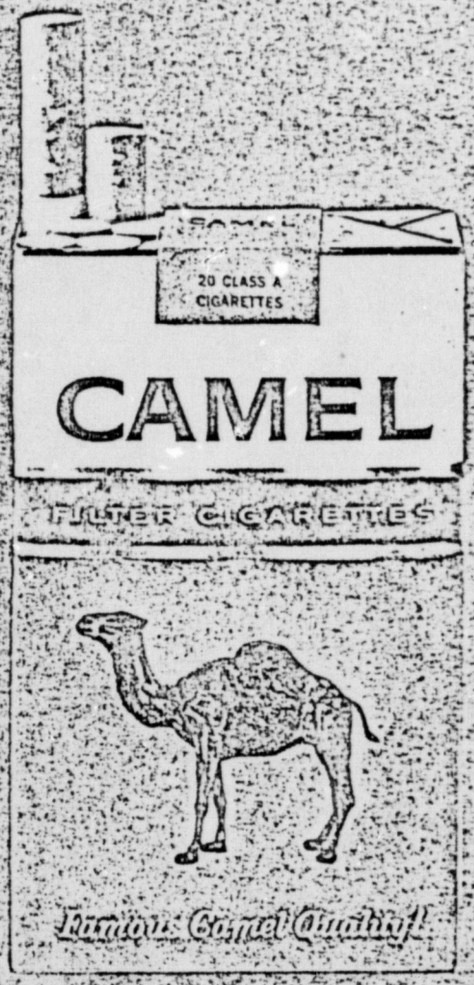
EXHIBIT O

[For convenience of Court and Counsel this exhibit is bound in on the opposite page.]



CLOSED

NK
J!
GAIN.



Warning: The Surgeon General Has Determined That Cigarette Smoking Is Dangerous to Your Health.

Attachment A--Exhibits to Statement

EXHIBIT P

Warning: The Surgeon General Has Determined That Cigarette Smoking Is Dangerous to Your Health.

Univers #47 — 16 point

Warning: The Surgeon General Has Determined That Cigarette Smoking Is Dangerous to Your Health.

Univers #47 — 14 point

Warning: The Surgeon General Has Determined That Cigarette Smoking Is Dangerous to Your Health.

Univers #47 — 12 point

Warning: The Surgeon General Has Determined That Cigarette Smoking Is Dangerous to Your Health.

Univers #47 — 10 point

Attachment A--Exhibits to Statement

EXHIBIT Q

14 Point Univers No. 47

Warning: The Surgeon General Has Determined That Cigarette Smoking Is Dangerous To Your Health.

12 Point Univers No. 47

Warning: The Surgeon General Has Determined That Cigarette Smoking Is Dangerous To Your Health.

10 Point Univers No. 47

Warning: The Surgeon General Has Determined That Cigarette Smoking Is Dangerous To Your Health.

Attachment A--Exhibits to Statement

EXHIBIT R

Warning: The Surgeon General Has Determined
That Cigarette Smoking Is Dangerous to Your Health.

Univers #47 — 16 point

Warning: The Surgeon General Has Determined
That Cigare Smoking Is Dangerous to Your Health.

Univers #47 — 14 point

Warning: The Surgeon General Has Determined
That Cigarette Smoking Is Dangerous to Your Health.

Univers #47 — 12 point

Warning: The Surgeon General Has Determined
That Cigarette Smoking Is Dangerous to Your Health.

Univers #47 — 10 point

Attachment A--Exhibits to Statement

EXHIBIT S

COMPARISON BETWEEN THE LEADING AND THE SPACING TO THE RULE FOR THE INDUSTRY STANDARD AND THE STAFF LITERAL

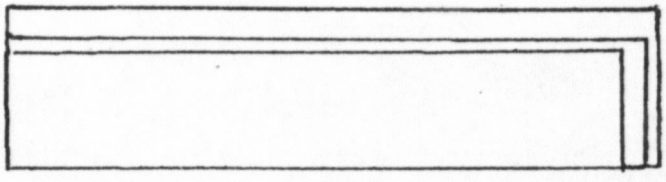
	Leading	Lower Vertical Spacing	Upper Vertical Spacing
10-pt. Warning Statement			
Industry Standard	7 pts.	10 pts.	10 pts.
Staff Literal	10 1/2 pts.	12 pts	12 pts.
12-pt. Warning Statement			
Industry Standard	7 1/2 pts.	12 pts.	12 pts.
Staff Literal	13 pts.	12 pts.	13 pts.
14-pt. Warning Statement			
Industry Standard	8 pts.	15 pts.	14 pts.
Staff Literal	16 pts.	16 pts.	17 pts.

Attachment A--Exhibits to Statement

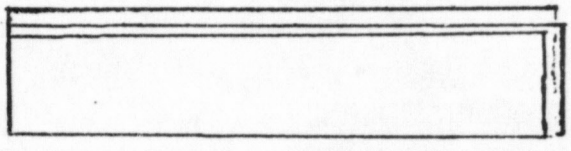
EXHIBIT T

Comparison Between The Total
Areas Of The Standard
And The Two Literals

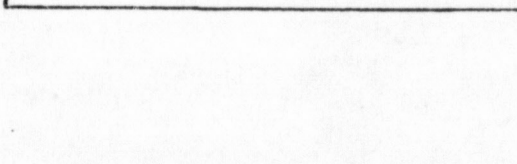
14 pt.



12 pt.



10 pt.



Blue - Staff Literal

Red - Industry Standard

Black - Industry Literal

Attachment A--Exhibits to Statement

BEHAVIOR

EXHIBIT U



SELLING APPLES IN NEW YORK, 1930
"Just what we need to toughen us up."

children. They themselves lived through the lean years, and now they see their kids rejecting the value of work. They are very exercised by the fact that a man would choose to be a musician rather than pick a more reliable profession like accountancy."

Even more common is the idea that hard times wi" experience fo ents lived thr strong," says assistant buy tan. "Our g easy. This is j en us up." A fluence is th the nation d erism, enviro eign adventures like Viet Nam.

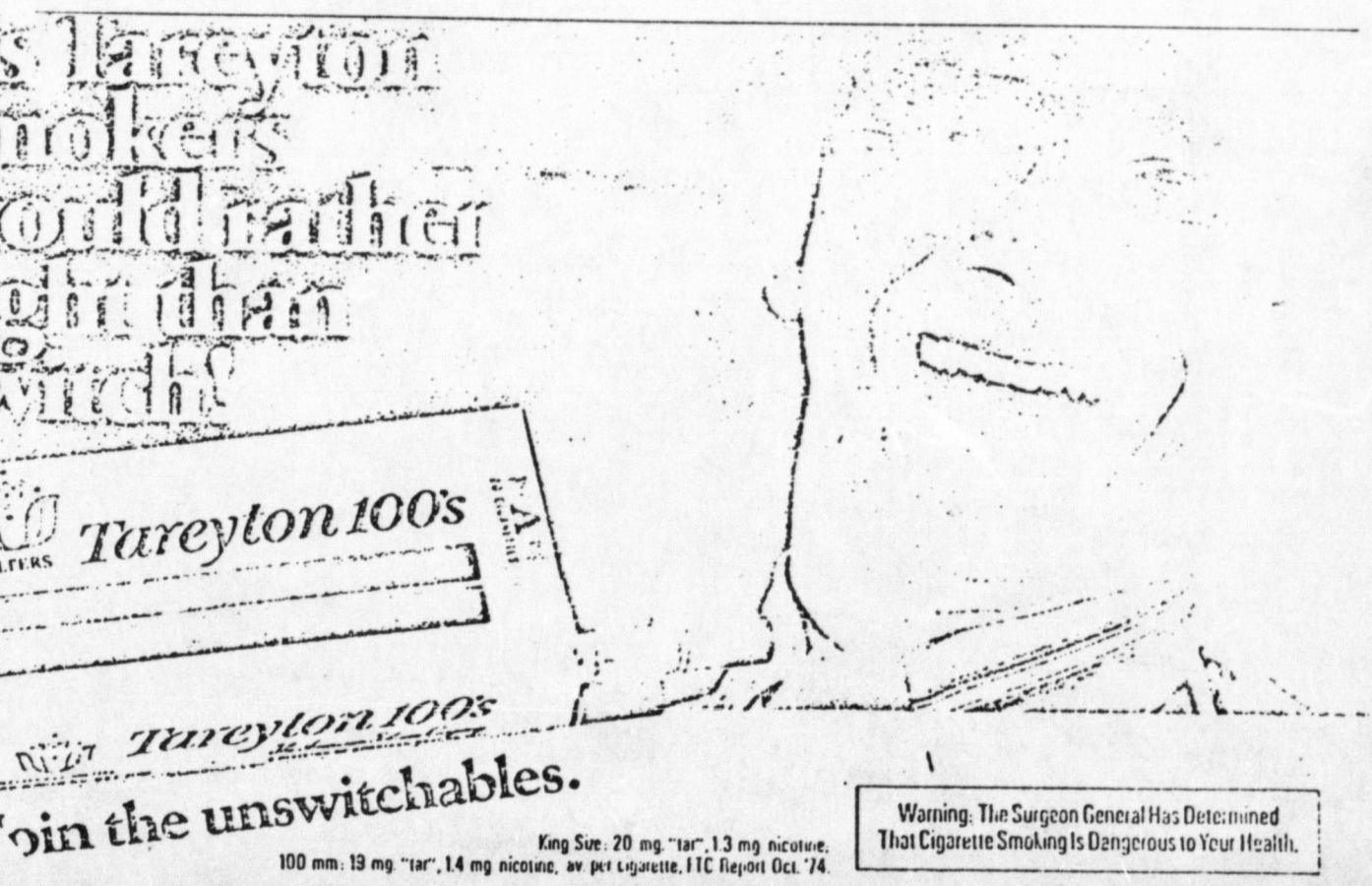
Several psychiatric concepts explain why some people embrace the thought of a depression. One is the phenomenon that occurs when the anxiety of waiting for a disaster becomes greater than the actual fear of facing it. In that case, a person may actually wish for the trouble to arrive and thus put an end to anxiety. Another concept is "repetition compulsion." "This applies to people who have a need to master the trauma of the past," explains Dr. Robert Reich, director of psychiatry for New York City's department of social services, who works with the thousands of homeless men who crowd the Bowery year after year. "These people constantly rework their past life; many of them lived through the Depression and never really recovered. They are always watching and waiting for the next." A few Bowery bums actually have money, but "are unable to stand the thought of spending it. If we were

Time 1/20/75

10 pt. - Industry Literal

vices, you may hope for some cataclysmic event to shake you out of it." Nostalgia for the '30s, fed by TV shows like *The Waltons*, can make the harsh realities of depression seem attractive.

Village Voice Columnists Howard Smith and Brian Van der Horst call it "depression fever." They recently polled 150 people and reported that one-fourth "look forward to [a depression] as some kind of perverse attraction." Understandably, those too young to remember the '30s were the most enthusiastic about the possibilities of a depression. Those who lived through the last one, reported the columnists, "thought we were crazy even to ask."





SELLING APPLES IN NEW YORK, 1930
"Just what we need to toughen us up."

children. They themselves lived through the lean years, and now they see their kids rejecting the value of work. They are very exercised by the fact that a man would choose to be a musician rather than pick a more reliable profession like accountancy."

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Several psy[illegible] why some people embrace the thought of a depression. One is the phenomenon that occurs when the anxiety of waiting for a disaster becomes greater than the actual fear of facing it. In that case, a person may actually wish for the trouble to arrive and thus put an end to anxiety. Another concept is "repetition compulsion." "This applies to people who have a need to master the trauma of the past," explains Dr. Robert Reich, director of psychiatry for New York City's department of social services, who works with the thousands of homeless men who crowd the Bowery year after year. "These people constantly rework their past life; many of them lived through the Depression and never really recovered. They are always watching and waiting for the next." A few Bowery bums actually have money, but "are unable to stand the thought of spending it. If we were to find ourselves in another depression,

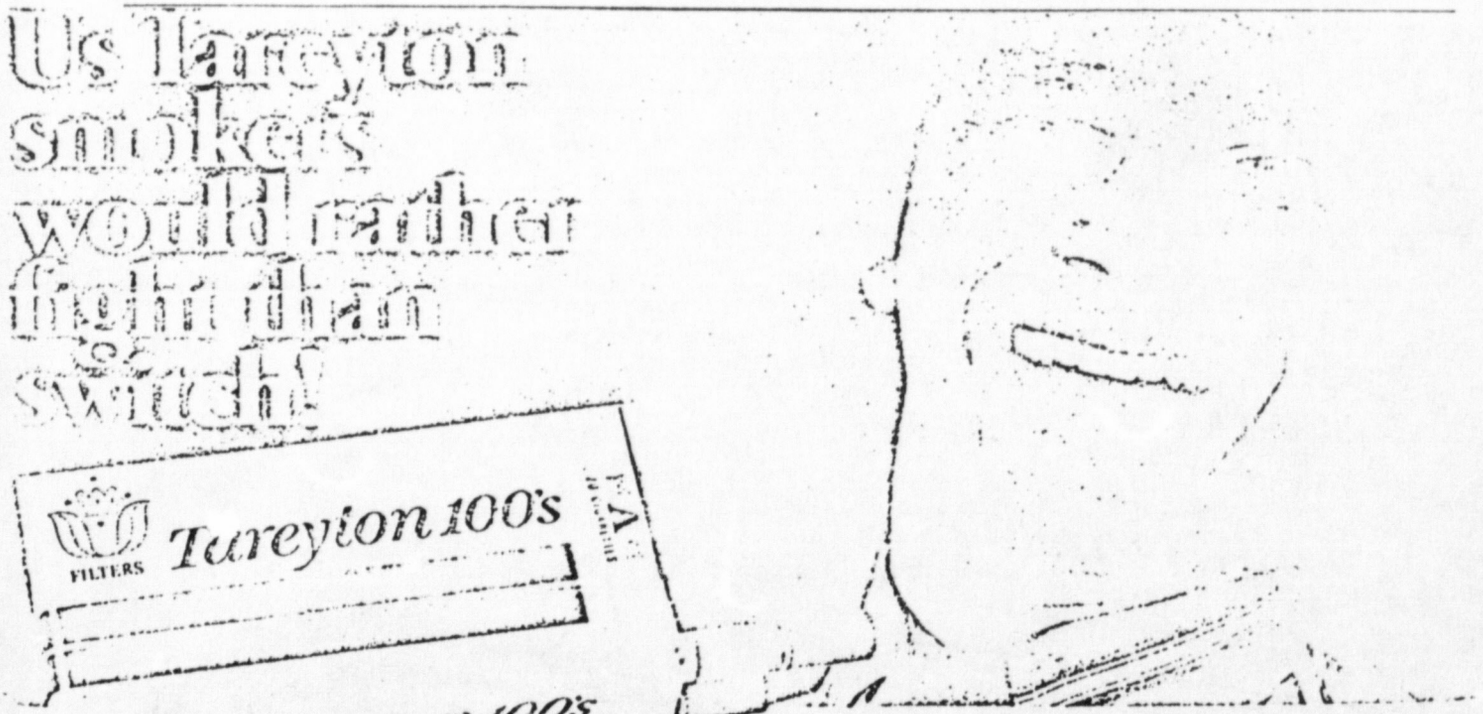
Time 1/20/75

10 pt. - Industry Standard

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Us Tareyton smokers would rather fight than switch.



Join the unswitchables.

King Size: 20 mg "tar", 1.3 mg nicotine;
100 mm: 19 mg "tar", 1.4 mg nicotine, av per cigarette, FTC Report Oct. '74.

Warning: The Surgeon General Has Determined That Cigarette Smoking Is Dangerous to Your Health

Attachment A--Exhibits to Statement



SELLING APPLES IN NEW YORK, 1930
"Just what we need to toughen us up."

children. They themselves lived through the lean years, and now they see their kids rejecting the value of work. They are very exercised by the fact that a man would choose to be a musician rather than pick a more reliable profession like accountancy."

Even more common is the idea that hard times w
experience fc
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strong," says
assistant buy
tan. "Our g
easy. This is
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fluence is th
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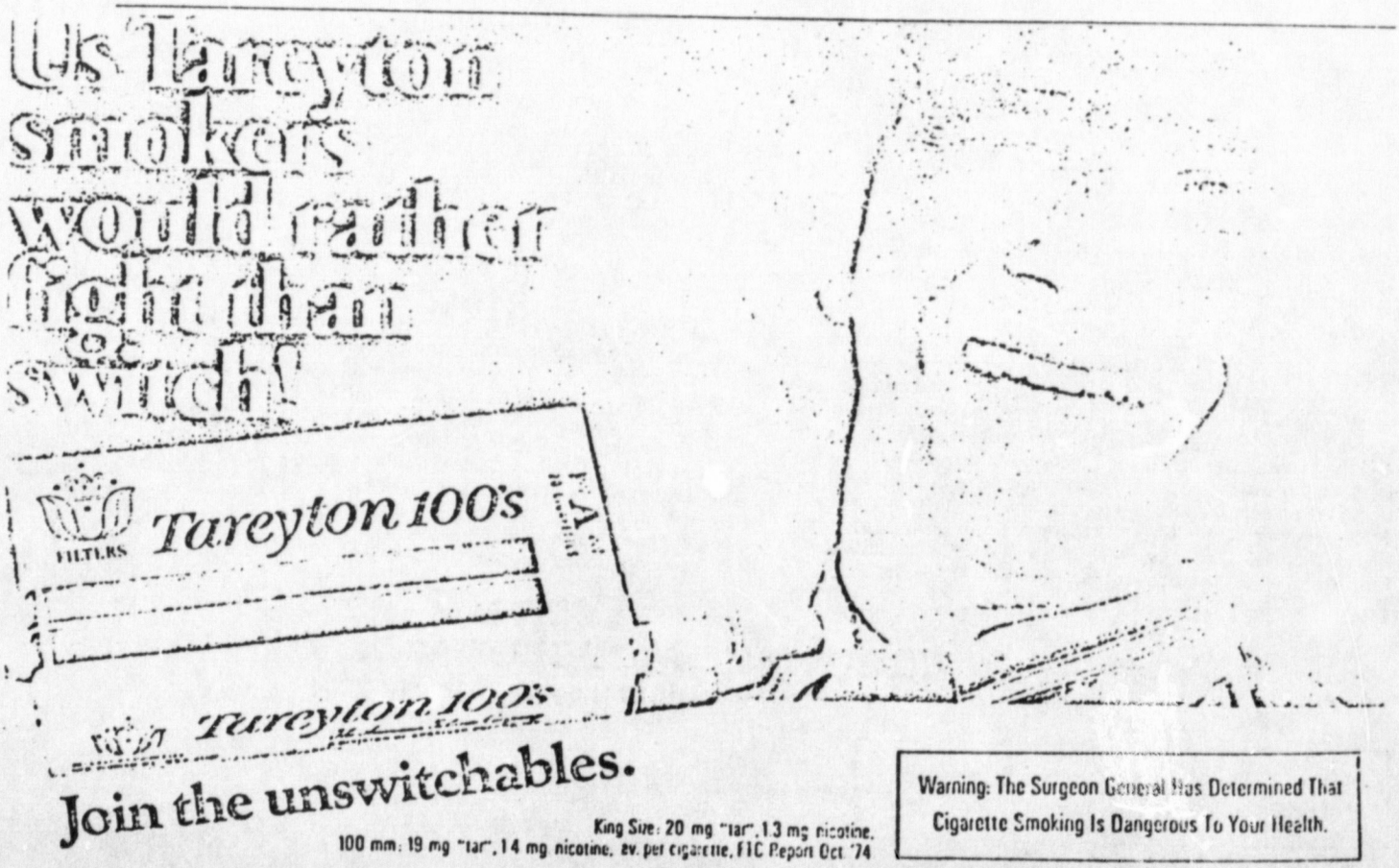
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Time 1/20/75

10 pt. - Staff Literal

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Join the unswitchables.

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100 mm: 19 mg "tar", 1.4 mg nicotine, av. per cigarette, FTC Report Oct '74

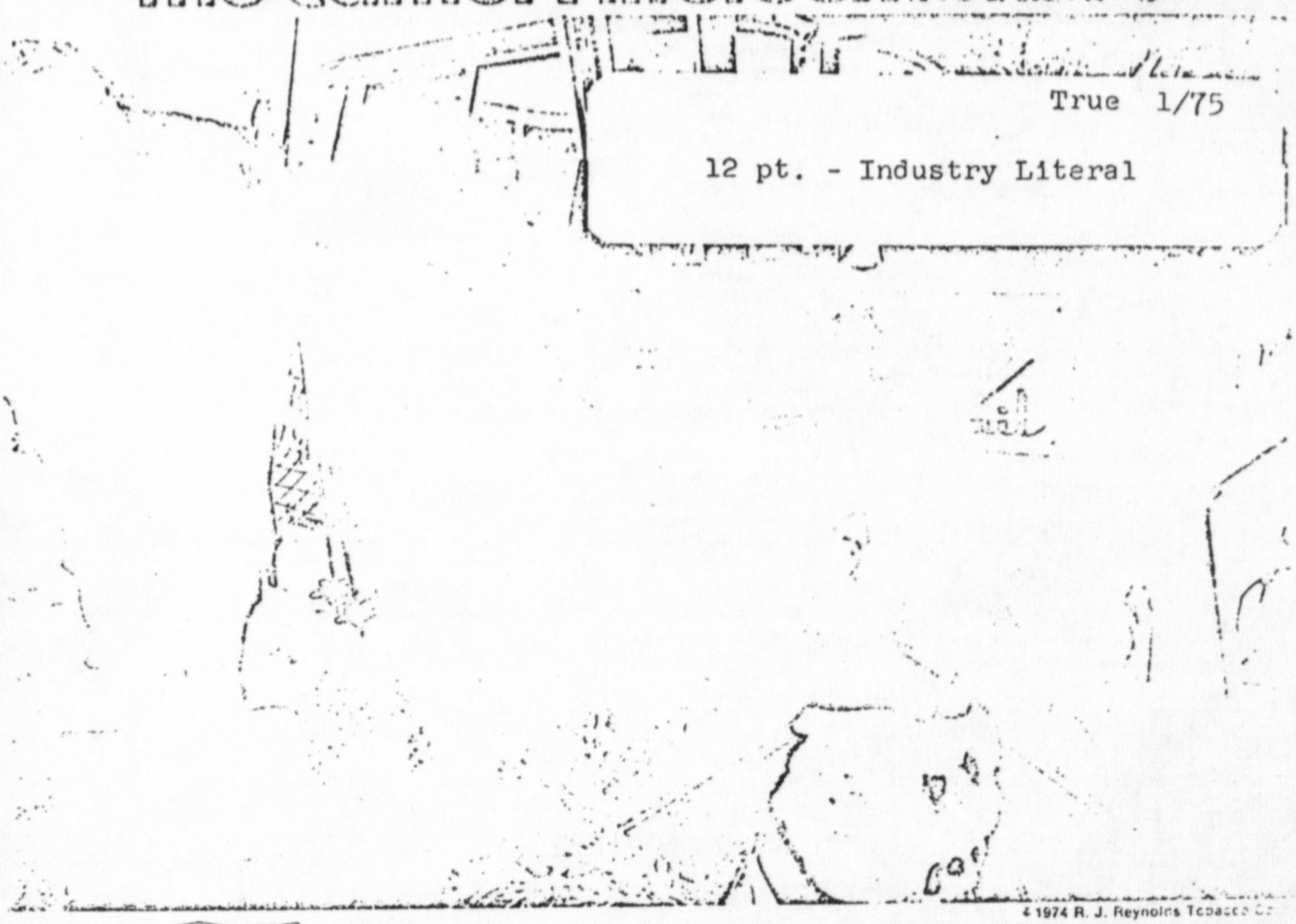
Warning: The Surgeon General Has Determined That Cigarette Smoking Is Dangerous To Your Health.

Attachment A--Exhibits to Statement

Can you spot the Camel Filters smoker?

True 1/75

12 pt. - Industry Literal



© 1974 R. J. Reynolds Tobacco Co.



Almost every skier up here today has a gimmick. Find the one who doesn't. **1.** Nope. He's Sandford R. Brochure, resort owner. Gimmick: Every weekend predicts "two inches of powder is coming!" (It's his wife—wearing heavy make-up.) Just bought some super-cool menthol cigarettes, and they turned to slush. **2.** She's Althea Home. Gimmick: Stretch pants so tight she mends them with spray paint. Thinks a ski pole is an athlete from Warsaw. **3.** An abominable snowman. **4.** No, he's Boyer U. Dumm, beginner. Skis like a man being attacked by a lumber yard. Has been picked up so often by ski patrol, they've sewn a handle on his jacket. His filter cigarette's taste is recessed so far, it needs lift tickets to bring it out. **5.** Right. He likes to put on skiis —not his fellow skiers. Wants his cigarette without fancy fads and gimmicks, too. Camel Filters. No nonsense. Just good taste and great tobacco. **6.** He's Gay Abandon, ski model. He's either wearing a huge fur hat—or his head is unravelling. Thinks a giant slalom is something you buy in an Italian deli. **7.** A pigeon, on his way to a formal dance.

Camel Filters.
They're not for everybody
(but they could be for you).

CAMEL

Warning: The Surgeon General Has Determined That Cigarette Smoking Is Dangerous to Your Health.

19 mg. "tar," 1.3 mg. nicotine av. per cigarette, FTC Report

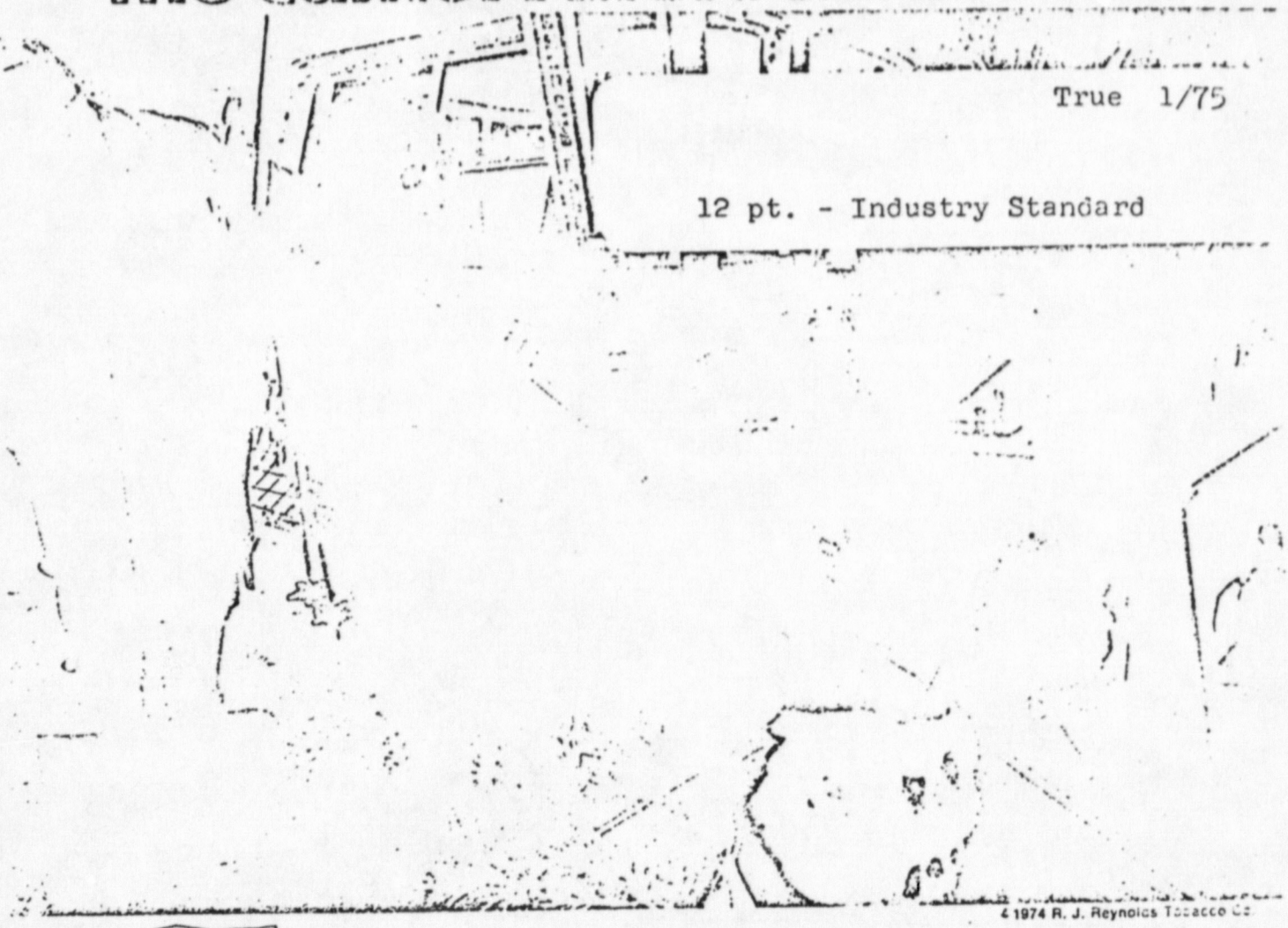
A 493

Attachment A--Exhibits to Statement

Can you spot the Camel Filters smoker?

True 1/75

12 pt. - Industry Standard



© 1974 R. J. Reynolds Tobacco Co.



Almost every skier up here today has a gimmick. Find the one who doesn't. **1.** Nope. He's Sandford R. Brochure, resort owner. Gimmick: Every weekend predicts "two inches of powder is coming!" (It's his wife—wearing heavy make-up.) Just bought some super-cool menthol cigarettes, and they turned to slush. **2.** She's Althea Home. Gimmick: Stretch pants so tight she mends them with spray paint. Thinks a ski pole is an athlete from Warsaw. **3.** An abominable snowman. **4.** No, he's Boyer U. Dumm, beginner. Skis like a man being attacked by a lumber yard. Has been picked up so often by ski patrol, they've sewn a handle on his jacket. His filter cigarette's taste is recessed so far, it needs lift tickets to bring it out. **5.** Right. He likes to put on skiis —not his fellow skiers. Wants his cigarette without fancy fads and gimmicks, too. Camel Filters. No nonsense. Just good taste and great tobacco. **6.** He's Gay Abandon, ski model. He's either wearing a huge fur hat—or his head is unravelling. Thinks a giant slalom is something you buy in an Italian deli. **7.** A pigeon, on his way to a formal dance.

CAMEL

Camel Filters.
They're not for everybody
(but they could be for you).

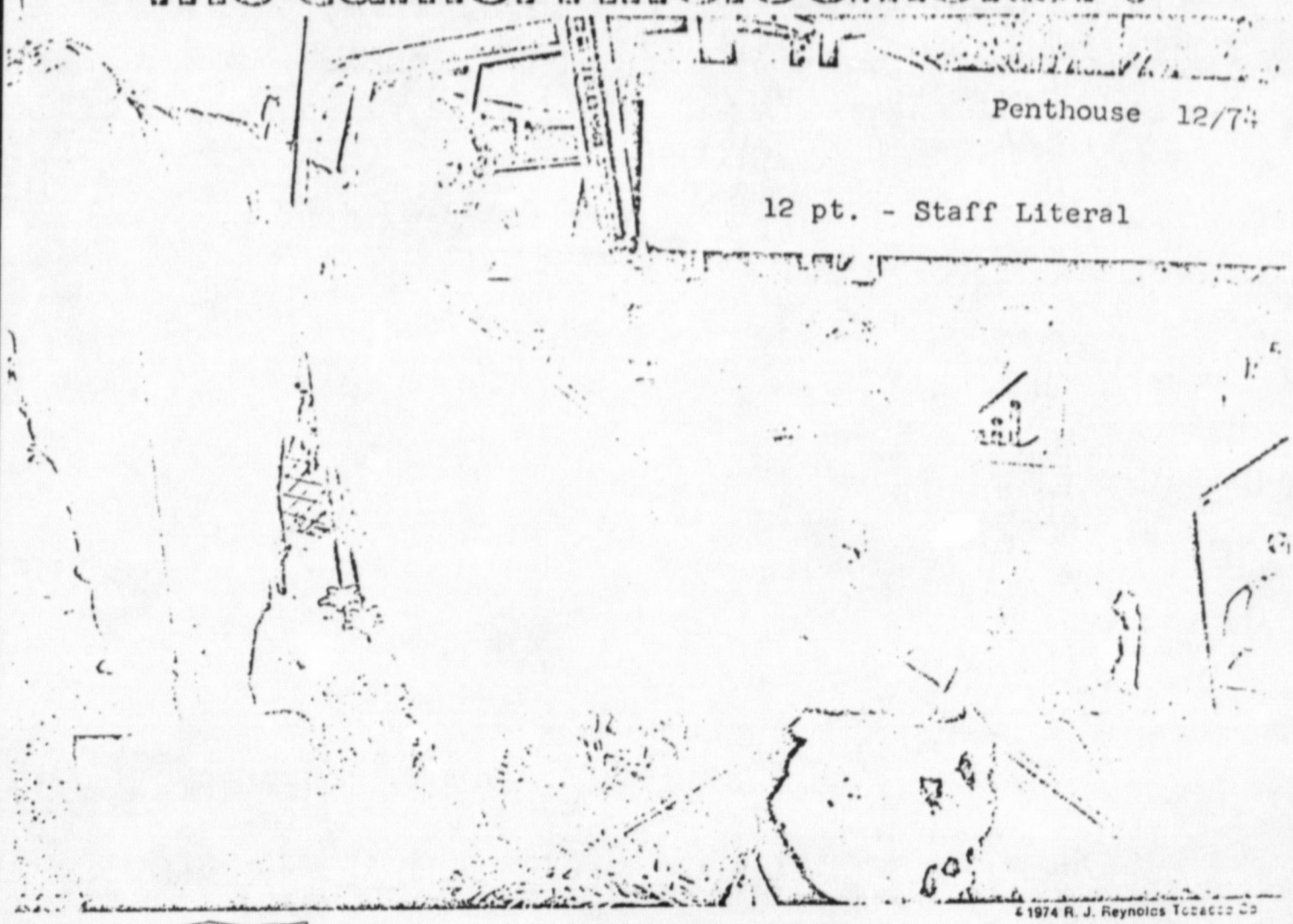
Warning: The Surgeon General Has Determined That Cigarette Smoking Is Dangerous to Your Health.

19 mg. "tar," 1.3 mg. nicotine av. per cigarette, FTC report Mar. '74

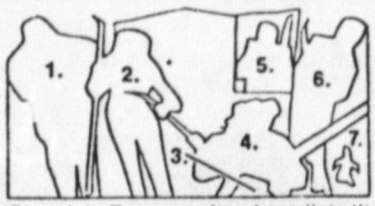
Can you spot the Camel Filters smoker?

Penthouse 12/74

12 pt. - Staff Literal



© 1974 R. J. Reynolds Tobacco Co



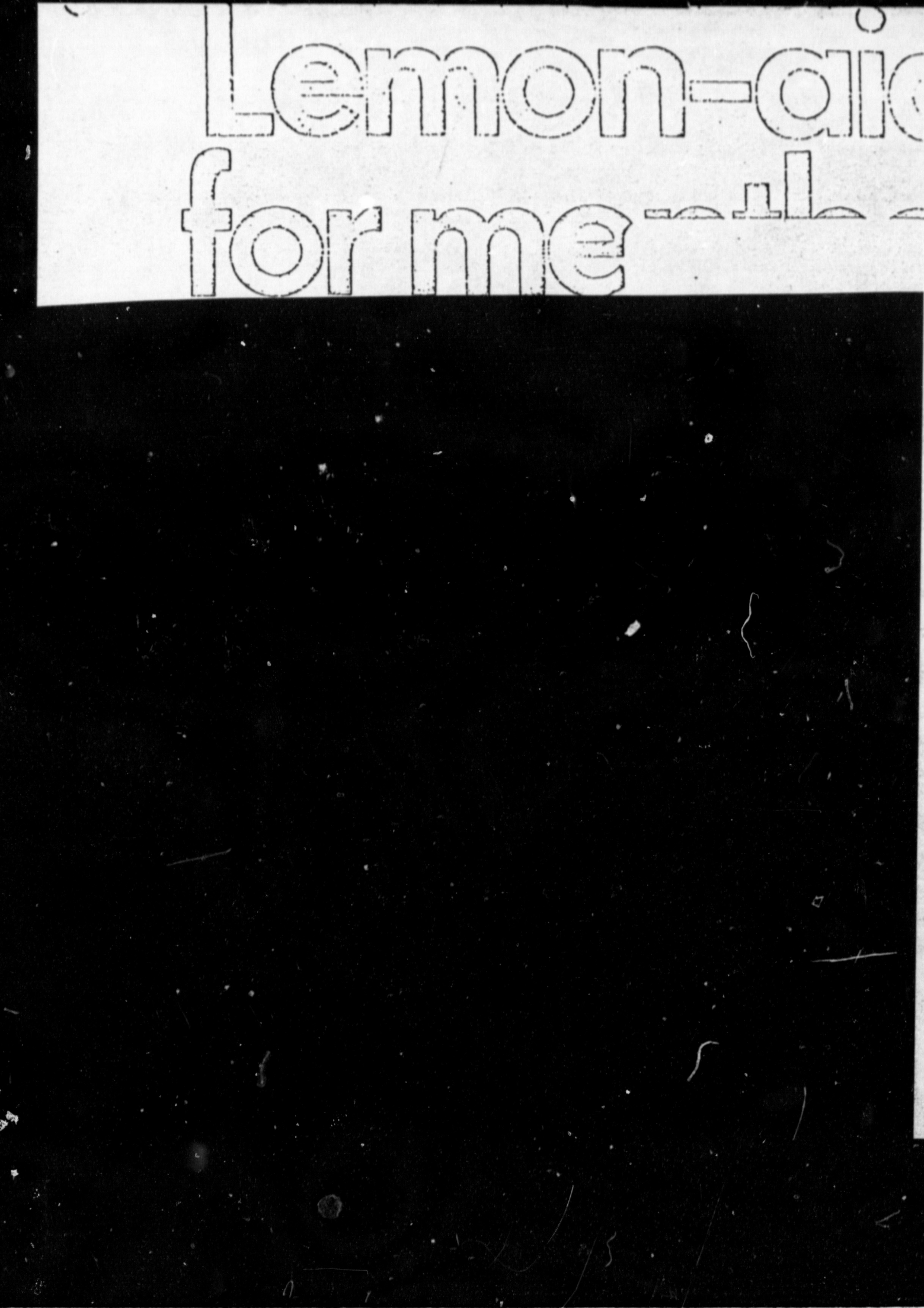
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19 mg. "tar," 1.3 mg. nicotine av. per cigarette, FTC Report

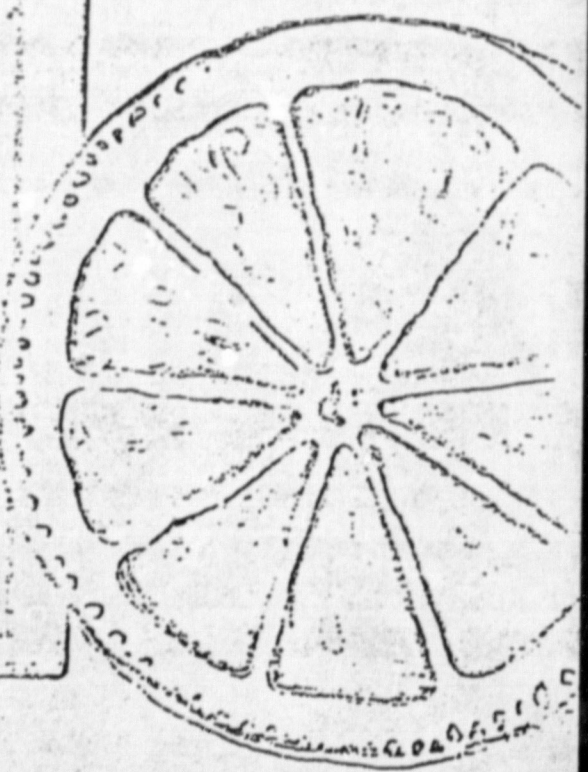

Lemon-ai
for me

14 pt. - Industry Lite:



All menthols promise a fresh, cool taste. But there's only one menthol with a dash of lemon freshness. So it tastes fresher than the others and gives you a smoother cool. Twist. The one and only lemon menthol.

Twist
Lemon Menthol 10



Warning: The Surgeon General Has Determined That Cigarette Smoking Is Dangerous to Your Health.

17 mg. "tar", 1.3 mg. nicotine av. per cigarette, FTC Report March '74.

Lemon-aid for me-tal

Eb



Wa·nir
That Cl

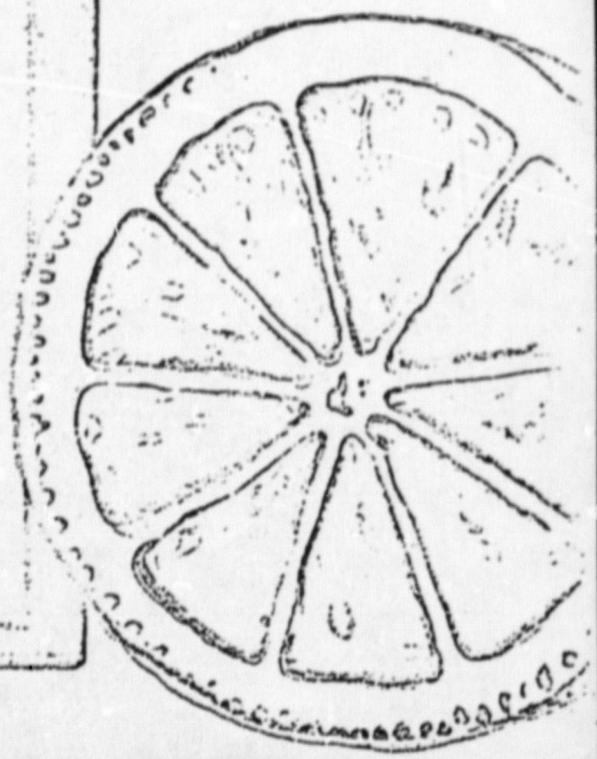
14 pt. - Industry Stanc



All menthols promise a fresh, cool taste. But there's only one menthol with a dash of lemon freshness. So it tastes fresher than the others and gives you a smoother cool. Twist. The one and only lemon menthol.

Twis

Lemon Menthol 10

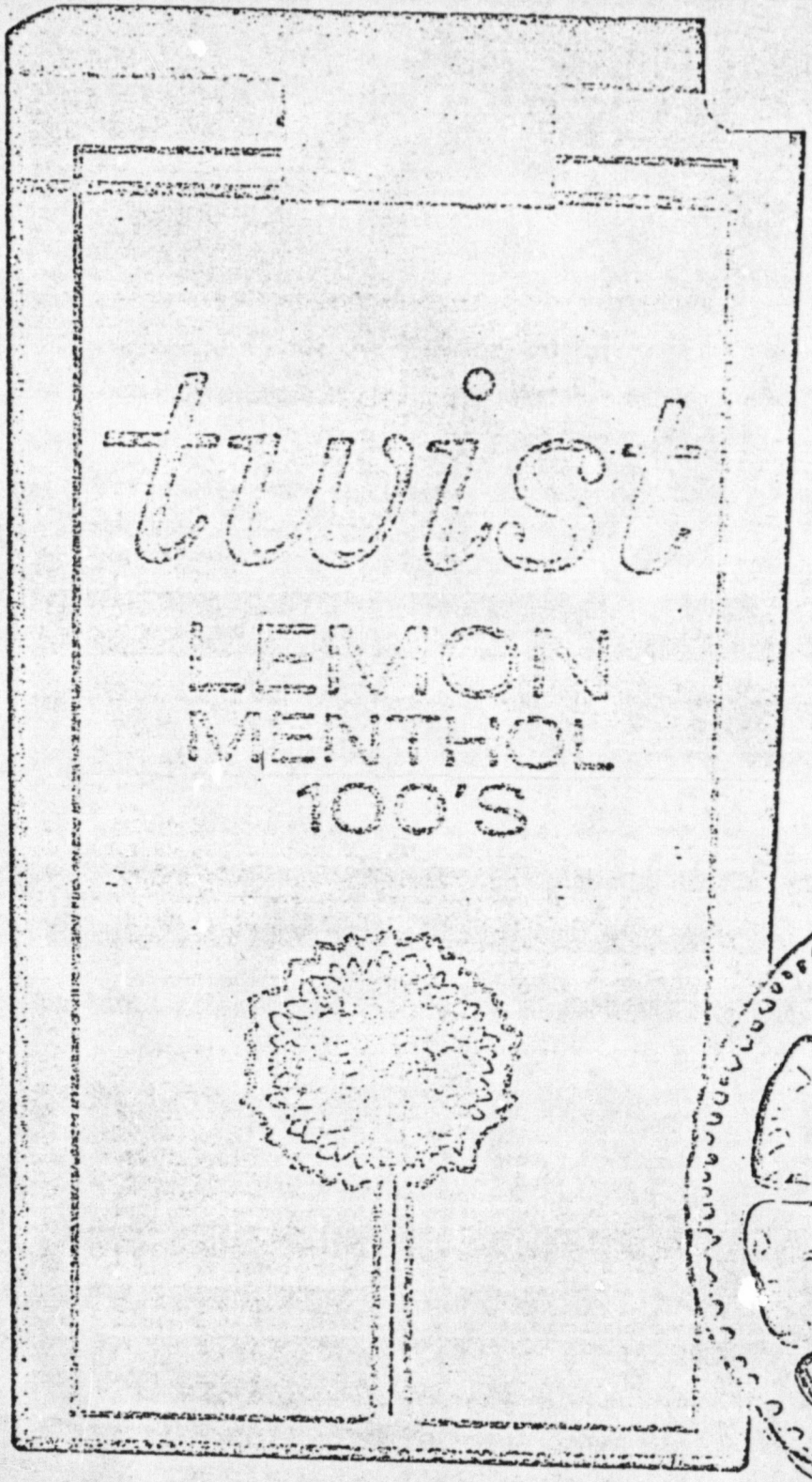


Warning: The Surgeon General Has Determined That Cigarette Smoking Is Dangerous to Your Health.

17 mg. "tar", 1.3 mg. nicotine av. per cigarette, FTC Report March '7..

Lemon-aid for me-th

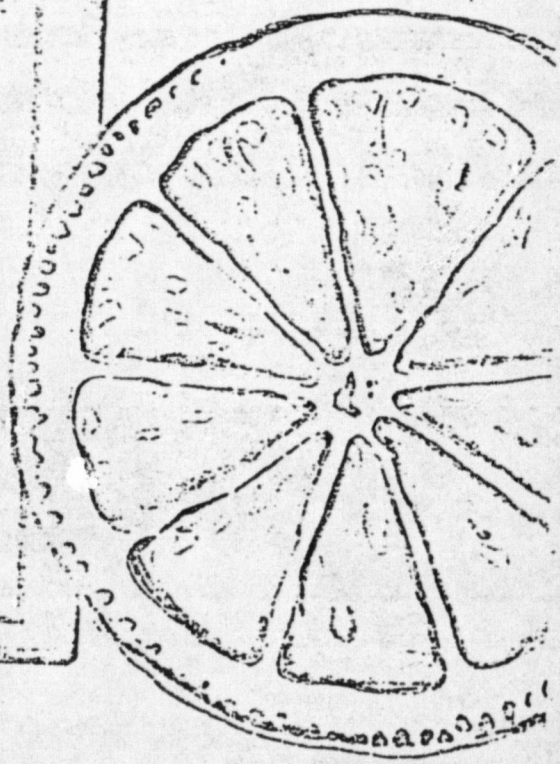
14 pt. - Staff Liter



All menthols promise a fresh, cool taste. But there's only one menthol with a dash of lemon freshness. So it tastes fresher than the others and gives you a smoother cool. Twist. The one and only lemon menthol.

Twis

Lemon Menthol

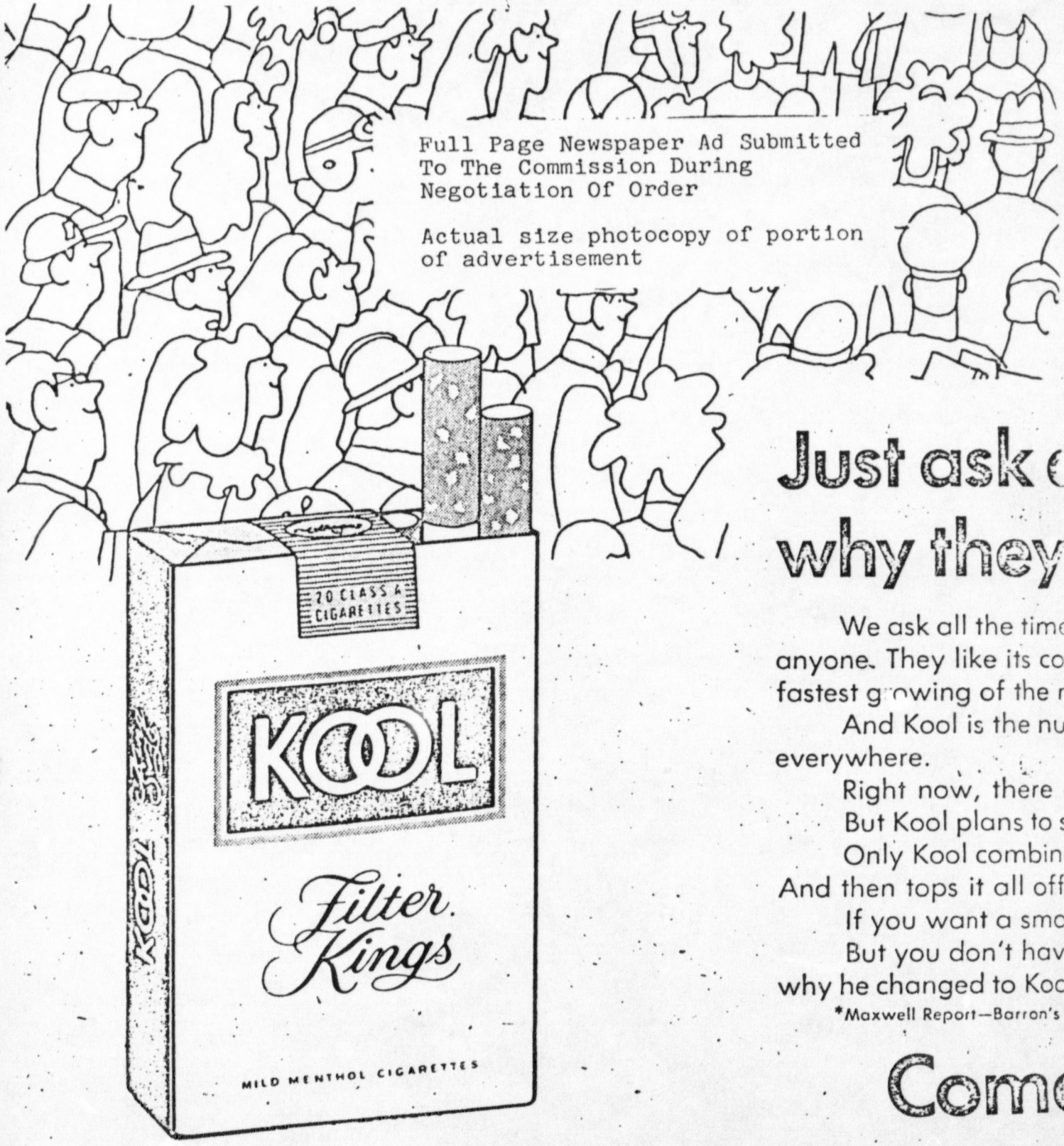


Warning: The Surgeon General Has Determined That Cigarette Smoking Is Dangerous To Your Health.

17 mg. "tar", 1.3 mg. nicotine av. per cigarette, FTC Report March '74.

Attachment A--Exhibits to Statement

EXHIBIT V



Full Page Newspaper Ad Submitted To The Commission During Negotiation Of Order

Actual size photocopy of portion of advertisement

Attachment A--Exhibits to Statement

EXHIBIT W

At newspaper execs' conference

Advertising Age, 2/3/75

Admen worry about narrower pages

HOLLYWOOD, FLA., Jan. 29—Daily newspaper execs left the International Newspaper Advertising Executives sales conference here today armed with more knowledge about the growing trend to narrower page widths, but also forewarned that not all advertisers welcome the trend.

Many publishers and advertisers hoped the moves to 55-in. and 56-in. newsprint rolls (AA, Jan. 27) would lead to greater standardization of page widths among dailies. Some advertisers, however, worried about losing impact with smaller ad units and about what they viewed as a rate increase in some cases.

Vance Stickell, vp-sales, and Don Maldonado, ad director, both of the *Los Angeles Times*, and Hal Jurgensmyer, operations vp, Knight-Ridder Newspapers, participated in a panel on the subject, added to the program at the last minute and moderated by Richard Carpenter, vp-marketing, *Philadelphia Bulletin*, and the 1974 INAE president. Mr. Jurgensmyer focused on the advantages of going to a six-column news and ad format, while the *Times* officials discussed the merits of the six-column news format and eight-column ad approach.

Mr. Stickell, who said his daily would have saved $3,500,000 with a 56-in. roll, but $4,200,000 with a 55-in. web, added that management did not even consider a six-column ad format because that would have meant a one-third increase in linage rates on top of two other rate hikes in the past year. There has been no client resistance to the changeover, although "a couple" of national and retail accounts were inconvenienced somewhat at first. United Airlines, for one, had been using a seven-column, full-page ad nationally, a size no longer accepted at the *Los Angeles Times*, he added.

■ Mr. Maldonado said the transition went smoothly, thanks to a prototype shown to clients nearly 90 days in advance. Some fashion stores were reluctant to try the new ad unit sizes until shown that their visual impact would not be lessened, he said. The *Times* has reduced some ads with "a shrink lens," so far at the daily's expense, he added.

The *Miami Herald*, which had eliminated seven-column, full-page ads and adopted more modular ad units in 1973, had considered wider page widths (*e.g.*, a seven-column format, nine-column display ads and ten-column classified) with fewer total pages per issue, according to Mr. Jurgensmyer. Its conversion to an all-six-column format on March 3 (AA, Jan. 27), he said, would have taken much longer if original manufacturer estimates on altering press equipment had been correct. But, using its own production people, the gear was redone for $125,000, compared to earlier $2,300,000 estimates, he said.

■ Mr. Carpenter hoped the trend would bring about "a greater degree of standardization than exists at present" in page sizes. However, a representative from a chain retailer among the 700 attendees complained to the INAE panel about the "hodge podge of sizes and shapes" caused by these moves, and said this will present a problem for chain retailers which create their ads centrally.

Another retailer, Edward Kreitz, ad promotion director, S.S. Kresge Co., Troy, Mich., including the K-Mart chain, indicated he was not convinced that narrower is better for retailers. He would welcome standardization of page sizes, he said, to make it easier for K-Mart's advertising people, who prepare 2,500 ad pages weekly for 450 dailies. Mr. Kreitz also urged publishers to warn their newsprint suppliers against further large price increases because "advertisers like K-Mart cannot reduce the number of items advertised in each ad or reduce the size of the display space . . . and still maintain comparative sales increases." If that were possible, he said, "we would have been doing it long ago. The fact is it doesn't work. We have reached the brink of diminishing returns."

■ K-Mart, he noted, uses 1,350 tons of paper for each of its rotogravure preprints distributed twice monthly to 36,000,000 people via 450 newspapers.

Alvah Chapman, Knight-Ridder president, told the INAE earlier in the week that each column inch in the six-column ad format "will be approximately one third wider than in our present eight-column format. Therefore, the rate per column inch . . . will be one-third higher. But a full page costs the same," as do one-half and one-quarter page ads, he emphasized. In a leave-behind, KRN conceded one disadvantage of the new format is "resizing" some national and retail ads, but the chain said most of its clients are in favor of the change.

■ Publishers with the "six-and-six" format will have to talk more in terms of pages and half-pages than in linage terms, said Mr. Jurgensmyer, who added that Media Records will restate their ad pages to an equivalent eight-page basis as it has long done for the *Louisville Courier-Journal*. Among the "significant number" adopting this "look of the future" this year, said Mr. Chapman, will be the *Minneapolis Star* and *Tribune*, *St. Paul Pioneer Press* and *Dispatch*, *Kansas City Star*, *Detroit News*, *Philadelphia Bulletin* and KRN's own major dailies, including the *Miami Herald* and *News* and *Philadelphia Inquirer*. The *New York Times*, too, is "seriously considering" the six-and-six format, he added.

Knight-Ridder felt disadvantages in the six-and-eight format chosen by the *Los Angeles Times* included "stacking" some ads to accommodate news columns and greater use of news fillers to complete pages occupied by less than full-page ads. Mr. Maldonado, however, said it has had no complaints to date from clients whose ads were "stacked."

■ Christo Jackson, Newspaper Advertising Bureau's chain store sales director, said Sears, Roebuck & Co. now is trying to standardize 37 different page widths used by 1,000 dailies. Sears also has urged its stores to avoid oddly shaped ads that are costly for papers to make up, in line with the bureau's suggestions on conserving newsprint.

Herb Lubalin, president, Lubalin, Smith, Carnase Inc., gave an art director's view of newspaper formating, which he said is typically "unreadable" and "indescribable," as well as "twice as bad" as the "pretty terrible" advertising dailies carry. Despite technological improvements, dailies have done little to modernize formats.

COUNTER AFFIDAVIT OF HORACE R. KORNEGAY ON MOTION
TO DISMISS AND TO SUPPLEMENT RECORD ON
APPLICATION FOR STAY OF PENALTIES

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

BROWN & WILLIAMSON TOBACCO CORP., PHILIP MORRIS INCORPORATED, R.J. REYNOLDS TOBACCO COMPANY, LOEW'S THEATRES, INC., AMERICAN BRANDS, INC., and LIGGETT & MYERS INCORPORATED,	)	75 Civ. 4047
	)	75 Civ. 4048
Plaintiffs	)	75 Civ. 4049
	)	75 Civ. 4050
v.	)	75 Civ. 4051
	)	75 Civ. 4052
LEWIS A. ENGMAN, PAUL RAND DIXON, MAYO J. THOMPSON, M. ELIZABETH HANFORD, STEPHEN NYE, FEDERAL TRADE COMMISSION, and EDWARD H. LEVI,	)	
Defendants.	)	

COUNTERAFFIDAVIT ON MOTION TO DISMISS
AND TO SUPPLEMENT RECORD ON APPLICATION
FOR STAY OF PENALTIES

DISTRICT OF COLUMBIA)
) ss:
CITY OF WASHINGTON)

Horace R. Kornegay, being duly sworn, deposes and says:

1. I am an attorney, duly licensed to practice law before the Supreme Court of North Carolina and the Supreme Court of the United States. Together with H. T. Austern, Esq., I participated as co-counsel in the negotiation of the Consent Cease and Desist Orders concerned in this litigation, and in the cooperative investigation of compliance with those Orders, and the extensive conferences over a four month period to negotiate a resolution of the controversy with the Commission staff and the Federal Trade Commission.

2. I have read the affidavit of Eric M. Rubin, Esq., of the Federal Trade Commission staff "based on information and belief," and assert that it contains the major errors of fact set forth in the counteraffidavit of my co-counsel, H. T. Austern.

3. At the outset of the compliance investigation in May 1974, and throughout the many conferences, I have repeatedly stated to the staff that if the respondents were advised specifically which advertisements were considered in violation of these Orders, the companies would promptly discuss particular revisions.

4. In late November 1974, during the staff informal interrogation of employees of one of the respondents, Mr. Maurice S. Meyer, the then head of the Compliance Division in the Bureau of Consumer Protection of the Federal Trade Commission, requested that I step out with him since at that point in the interrogation neither Mr. Meyer nor I was engaged in questioning. We went into a small waiting room, and Mr. Meyer then entered into a discussion of his views as to how this controversy could be resolved. Among other things he stated that there would have to be a payment of money for past violations. I asked Mr. Meyer how much money he had in mind and what specific violations it related to. He stated to me that he could not give me an exact figure but that it must be sufficiently large to be "painful." He repeated the word "painful" several times. I advised him that the industry had negotiated the Consent Orders in good faith and that each

company had endeavored to carry the Orders out in good faith, and that certain of the areas now being investigated by the Compliance Division were beyond the control of the tobacco companies, such as newspaper shrinkage, or not covered by the Orders. I went on to say that while I would report back to the companies his proposal that in my view they could not seriously consider a monetary settlement until such time as he arrived at and informed us of a specific amount of money to be paid by each company for its specific violations. I told him my reason for this statement was that it would certainly be unreasonable to expect the six companies simply to divide a gross amount among themselves and that if any were required to pay civil penalties that the amount of those penalties should be related to violations of the Orders, if any, committed by a particular company.

5. I was present at the final conference on February 7, 1975, with Director Rosch and his staff. I can confirm with my own knowledge the facts recited by Mr. Austern in Paragraph 9 of his counteraffidavit.

6. Throughout the sessions with the staff, I repeated, and it was emphasized by Mr. Austern, that it was of cardinal importance that agreement be reached as to the future because of the large volume of advertising concerned, the problem of penalties running, and the respondents' interests in avoiding continuing and costly future litigation. To that end, I concurred in the recommendations and accommodations proposed by the respondents in the Aide Memoir presented to

the Director, J. Thomas Rosch, Esq., on January 16, 1975, and in turn submitted to the full Commission in the Statement to Accompany Staff Report and Recommendations Concerning Past and Future Compliance on March 14, 1975.

7. The staff has consistently refused to discuss these recommendations and accommodations, of vital importance for the future, unless the respondents came forward with large sums of money and conceded the existence of extensive and largely unparticularized past violations. Against the facts of that background, the Commission in its letters of August 1, 1975, formally indicated its "determinations" of past violations on unspecified advertisements in wide categories of advertising in magazines and newspapers, on point-of-sale materials, and with respect to vending machines, and confirmed the staff position.

8. In these circumstances, the fact is that unless the respondents put up at the outset large sums of money and acquiesce in the broad assertion of overall violation only generally "determined" in the August 1, 1975, formal letter orders of the Commission as violative of these Consent Orders, or hazard continuing their advertising at the risk of accumulating penalties, they have no further administrative recourse for any prompt resolution of the controversy.

Horace R. Kornegay

[Sworn to September 5, 1975]

AFFIDAVIT OF WILLIAM J. MOORE IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS AND TO SUPPLEMENT RECORD

UNITED STATES DISTRICT COURT FOR THE

SOUTHERN DISTRICT OF NEW YORK

AMERICAN BRANDS, INC., Plaintiff, -against- FEDERAL TRADE COMMISSION, et al., Defendants.	75 Civ. 4051 (CHT) Consolidated with: 75 Civ. 4047 75 Civ. 4048 75 Civ. 4049 75 Civ. 4050 75 Civ. 4052 AFFIDAVIT IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS AND TO SUPPLEMENT RECORD

SERVED SEP 8 1975

By_____

FILED SEP 8 1975

By_____

Per_____

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

WILLIAM J. MOORE, being duly sworn, deposes and says:

1. I am the Deputy Advertising Director of The American Tobacco Company, a division of American Brands, Inc. (herein American), and have held such position for eight years.

2. I make this affidavit in opposition to defendants' motion to dismiss and to supplement the record on American's application for a stay of penalties pending final judgment.

3. In my position as Deputy Advertising Director, I am fully familiar with the contents of the Order of the Federal Trade Commission issued on March 30, 1972 ("Consent Order"). I am personally familiar with the

implementation of the Consent Order in American's advertising since 1972.

4. Various measures have been taken to insure that American is in full compliance with the Consent Order. American's employees responsible for advertising were given a copy of the Consent Order and have been instructed to abide by its terms and provisions. Additionally, all of American's advertising agencies were given copies of the Consent Order and were advised that it was mandatory that American's advertising contain the caution notice as required by the Consent Order. Further our sales organization was notified of the items which were covered by the Consent Order and were instructed to destroy all material which did not contain the required warning notice.

5. In accordance with my instructions, proofs of the various sizes of the caution notice in Univers 47 (Fdy) type with the surrounding box in the sizes mandated by the Consent Order were prepared by BBD&O, one of American's advertising agencies. In addition an acetate overlay was prepared by them in exact literal compliance with the Consent Order. American's media advertising from the effective date of the Consent Order to the present has been checked against these acetate overlays to insure that it is in full compliance with the Consent Order.

6. By letter dated April 21, 1972 the FTC

Division of Compliance directed American to file a written report of compliance. I personally had assembled all of the 142 exhibits enclosed in American's Compliance Report. The items sent to the Commission represented all manner and form of American's advertising, as requested and in accordance with the instructions received from the Division of Compliance. This fact was communicated to the Commission in the report dated September 12, 1972:

> "Enclosed herewith as Exhibits 1 through 142 are samples of all the cigarette advertising prepared for this Company which had regular closing dates, or in the regular course had to have been delivered in final form to the printer, publisher or production house, or painted or assembled on bill boards, on or after July 13, 1972. These Exhibits demonstrate full compliance with the Order."

7. The exhibits sent to the Commission included proofs of newspaper and magazine advertisements, glossy photographs of billboard advertising, transit card advertisements, and actual point of sale advertising.

8. The Compliance Report, with exhibits, was accepted without objection by the Commission in a letter dated December 20, 1972.

9. From the effective date of the Consent Order to the present, American's advertising has appeared at various times in over 250 newspapers nationwide and 50 magazines, including the Washington Post and other publications with large circulations in the District of Columbia which were readily viewable by Commission and its staff.

10. By letter dated May 10, 1974, the Division of Compliance informed American that it was initiating an investigation and requested a large number of documents. During the course of this investigation, which lasted for approximately 10 months, I assisted in the gathering of over 1200 exhibits for submission to the Commission. I and four other Company employees explained in detail when interviewed by the Commission Staff how American took great pains to comply with the Consent Order. Additionally, I am informed that seven representatives from American's advertising agencies also advised the Commission Staff how they implemented the terms of the Consent Order.

11. By letter dated August 1, 1975, the Commission informed American of its determination that certain categories of American's advertising were in violation of the Consent Order. In my capacity as Deputy Advertising Director, I have read that official communication, but I am unable to determine how American's advertising does not comply with the Consent Order. The determinations of violations are so vague and indefinite that it is impossible for me to understand in what manner American's advertising violates the Consent Order and which specific advertisements are allegedly violative. Thus, although I am in part responsible for insuring that American's advertising complies with the Consent Order, I

am unable from the letter to determine how American would modify its advertising.

12. It is my belief that American's advertising, unchanged in manner and form since 1972, fully complies with the Consent Order. Under such circumstances, I am left in a very real dilemma of not knowing how or if American's advertising violates the Consent Order nor how the advertising may be modified to bring it within the Commission's interpretation of the terms of the Consent Order, if indeed it is in violation.

William J. Moore

Sworn to before me this
8th day of September, 1975.

David J. O'Neill

DAVID J. O'NEILL
Notary Public, State of New York
No. [illegible]
Qualified in Nassau County
Certificate filed in New York County
Commission Expires March 30, 1976

COUNTER AFFIDAVIT OF J. R. AVE ON MOTION TO DISMISS AND TO SUPPLEMENTAL RECORD ON APPLICATION FOR STAY OF PENALTIES

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

LOEW'S THEATRES, INC.,

Plaintiff,

- against -

LEWIS A. ENGMAN, Chairman, Federal Trade Commission, et al.,

Defendants.

75 Civ. 4050
Consolidated with
75 Civ. 4047
75 Civ. 4048
75 Civ. 4049
75 Civ. 4051
75 Civ. 4052

----------x

COUNTERAFFIDAVIT ON MOTION TO DISMISS AND TO SUPPLEMENT RECORD ON APPLICATION FOR STAY OF PENALTIES

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

J. R. AVE, being duly sworn, deposes and says:

1. I am Vice President - Advertising and Brand Management of Lorillard, a division of Loew's Theatres, Inc., and have held such position since December 1973.

2. I have a primary responsibility for Lorillard's compliance with the Federal Trade Commission consent order issued on March 30, 1972 (Docket No. C-2180) ("consent order"). In meeting this responsibility, I approve all

Lorillard advertising (including sales promotional materials) in accordance with guidelines which were established by Lorillard's General Counsel. These guidelines, which have been distributed widely among Lorillard employees, Lorillard's advertising agencies' employees and their respective suppliers, enable us to ascertain whether or not the warning statement is required with respect to any particular promotional piece we may contemplate producing, and if it is required, what the proper size of the statement should be. In addition to these guidelines, we have had standard acetates prepared by Lorillard in accordance with the terms of the consent order. These acetates are used to assure that the actual size of a particular warning in every advertisement is in compliance with the requirements of the consent order. When specific questions arise as to compliance with the consent order, the Office of Lorillard's General Counsel is immediately consulted by me, other Lorillard employees, Lorillard's advertising agencies and respective suppliers, to resolve such questions and to assure that all persons involved understand the requirements of the consent order.

3. On or about August 5, 1975, I reviewed a letter Lorillard received from the Federal Trade Commission, dated August 1, 1975, in which the Commission stated that it

had determined that Lorillard has violated the consent order in various respects. After reading the Commission's determinations concerning the areas in which it deems Lorillard to be in non-compliance, I am unable to determine how Lorillard's advertising does not comply with the consent order. Except for a few illustrations, the determinations are so indefinite that it is impossible for me to delineate the advertisements which the Commission deems to be in non-compliance. Furthermore, as to all asserted violations, the Commission's letter fails to specify the measures I should take to conform our practices with the Commission's determinations, including those relating to the Commission's examples.

(a) Thus, the Commission declared in its August 1, 1975 letter that advertisements on vending machine display panels that fail to include the warning statement violate the consent order. Assuming arguendo that Lorillard's practices constitute violations, the Commission has not provided guidance as to how the warning statement should be depicted on the display panel, or how Lorillard's "advertising display area" should be measured so as to avoid a violation.

(b) In connection with the Commission's determination that the warning statement on point-of-sale material is in a type size smaller than that required for the advertising

display area, the Commission fails to inform us how we should compute the advertising display area for such materials which are diverse in overall size and design.

(c) Lorillard was also notified in the August 1, 1975 letter that the Commission holds it responsible for asserted violations which may occur in newspapers, magazines and other periodicals. Although Lorillard cannot be certain, the Commission is apparently referring to a printing phenomenon known as "shrinkage." Lorillard, however, provides full and properly sized production materials to the various publishers in all print media from which actual reproductions may be made. It is impossible for Lorillard to control the printing practices and techniques of thousands of newspapers and hundreds of magazines and other publications, or to control the varying amount of "shrinkage" that occurs publication by publication.

(d) The Commission's letter also advised Lorillard that the warning statements appearing on billboards, although complying with the type size requirements in the consent order, are nonetheless in violation of the order. Despite the categories and relationships of warning size to overall billboard size set forth in Section I-D of the consent order, the Commission asserts that compliance with such

specific requirements is not "clear and conspicuous." However, the Commission totally fails to provide guidance as to what its vague, new "clear and conspicuous" standard requires with respect to particular sizes of billboards.

4. The result of the Commission's August 1, 1975 letter is to place Lorillard in a very real dilemma of not knowing which of its advertisements allegedly violate the consent order, nor how its advertising may be rectified to satisfy the Commission's interpretation of the requirements of the consent order if Lorillard's advertising practices are indeed deficient.

s/ J. R. Ave
J. R. Ave

Sworn to before me this
9th day of September, 1975

s/ Rose Senenko
NOTARY PUBLIC

ROSE SENENKO
Notary Public, State of New York
No. 41-0608415 Queens County
Certificate filed in New York County
Commission Expires March 30, 1977

Start fresh with Belair



Warning: The Surgeon General Has Determined That Cigarette Smoking Is Dangerous to Your Health